

No. 12428

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM P. THORNTON,

Appellee.

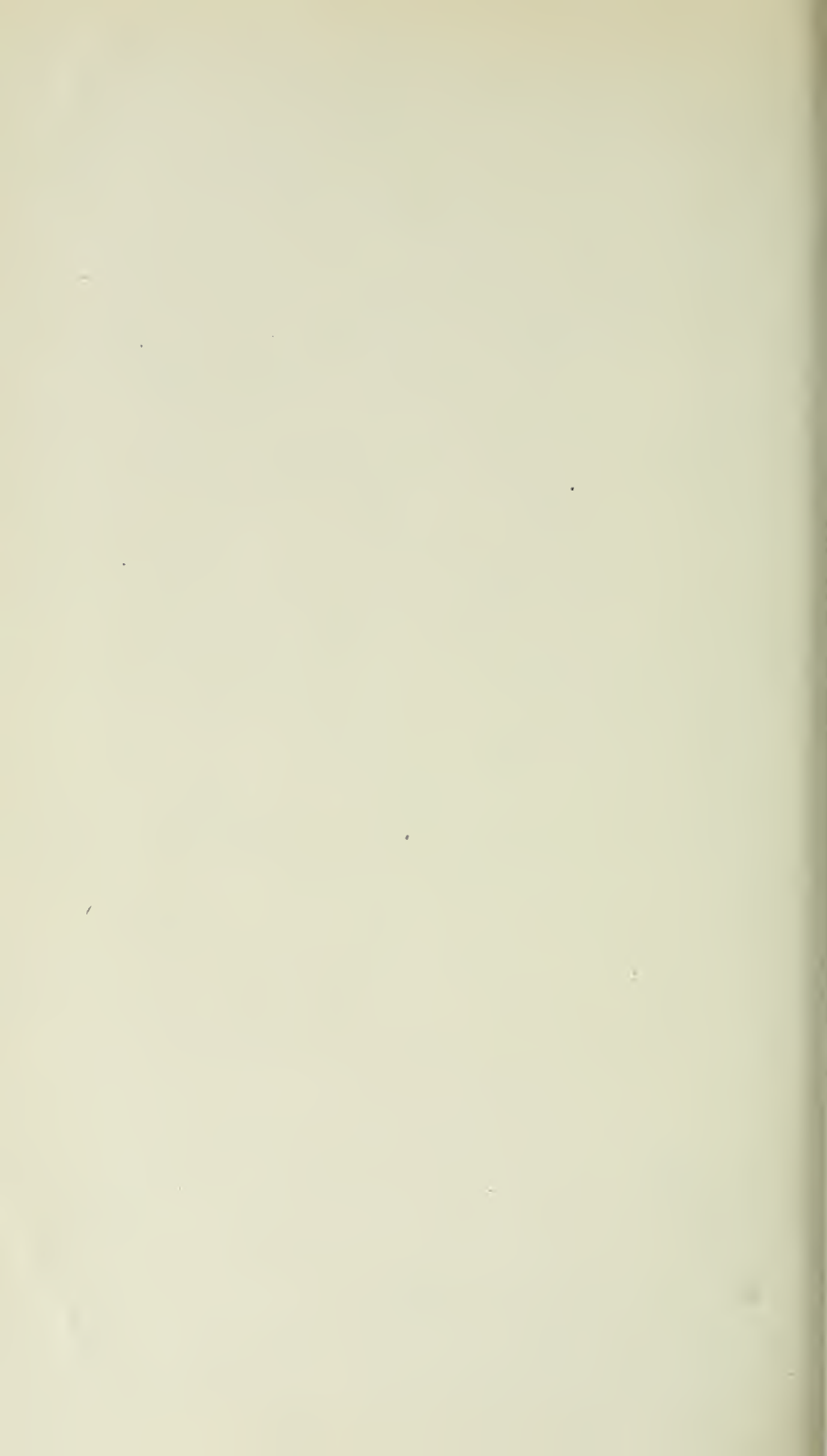
Apostles on Appeal

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

MAR 9 - 1953

PAUL P. O'BRIEN,
CLERK



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for the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

J. CHARLES DENNIS,

JOHN E. BELCHER,

Proctors for Appellant,
1017 U. S. Court House,
5th at Spring,
Seattle 4, Washington.

MARION GARLAND, JR.

Proctor for Appellee,
104-8 Dietz Bldg.,
Bremerton, Washington.

In the District Court of the United States for the
State of Washington, Western District, North-
ern Division

No. 15377

WM. P. THORNTON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff, Wm. P. Thornton, and for cause of action against the United States Government, defendant, alleges:

I.

That plaintiff is a citizen of the United States of America and at all times herein mentioned a resident of Kitsap County, Washington. That plaintiff is pursuing a claim against the United States of America for service pay while serving as Night Mate aboard an Army Vessel, that is, on the *Gocher Victory*, for several weeks, and this court has jurisdiction of the plaintiff and of his claim for unpaid wages, and of this suit by virtue of United States Code Annotated, Title 28, Judicial Code and Judiciary, Sec. 41, Div. 20, concurrent with the United States Court of Claims.

II.

That from July 10, 1947, to August 14, 1947, for a period of thirty five (35) days, plaintiff was employed by the War Department (Army) of the United States of America, at the immediate instance of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, for fifteen hours per day as Night Mate aboard the Army Transport, Gocher Victory, the hours being from 4:30 P.M. in the afternoon until 8 o'clock A.M. the following morning, at the rate of \$17.25 for a fifteen hour shift, and performing work and rendering services to the defendant which otherwise would have been performed by other *personell* of the same or similar rating to that of the plaintiff, whereby the defendant became indebted to plaintiff in the amount of \$603.75 for services rendered as aforesaid, no part of which has been paid, although duly claimed and demanded by plaintiff.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of \$603.75 and for costs of suit.

/s/ MARION GARLAND, JR.,
Attorney for plaintiff.

State of Washington,
County of Kitsap—ss.

Wm. P. Thornton, being first duly sworn on oath, deposes and says: that he is the plaintiff above named, that he has read the foregoing complaint.

knows the contents thereof, and believes the same to be true.

/s/ WM. P. THORNTON.

Subscribed and sworn to before me this 7th day of June, 1948.

[Seal] /s/ MARION GARLAND, JR.,
Notary Public in and for the State of Washington,
residing at Bremerton.

[Endorsed]: Filed July 7, 1948.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Marion Garland, Jr., plaintiff's attorney, whose address is 107 Dietz Building, Bremerton, Washington, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

MILLARD P. THOMAS,
Clerk of Court.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

Date: July 7, 1948.

Received July 7, 1948, U. S. Marshal, Seattle,
Wash.

Return on Service of Writ attached.

[Endorsed]: Filed July 9, 1948.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue process to be served with copy of Complaint on defendant.

July 7, 1948.

/s/ MARION GARLAND, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed July 7, 1948.

[Title of District Court and Cause.]

APPEARANCE

To: Wm. P. Thornton, Plaintiff herein, and to Marion Garland, Jr., his attorney:

You, and Each of You, will hereby please take notice that J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, hereby enter their appearance as attorneys for the defendant above named, and you will please serve all notices, pleadings and papers in connection with said case upon them at their address stated below.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

Copy received Sept. 11, 1948.

[Endorsed]: Filed September 13, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, defendant in the above entitled cause, and for answer to the complaint on file herein, admits, denies and alleges as follows:

I.

Answering paragraph I, the defendant alleges it does not have sufficient information to form a belief as to the citizenship or residence of the plaintiff and therefore denies the said allegations. Further answering said paragraph, defendant denies each and all of the other allegations thereof.

II.

Answering paragraph II, the defendant denies each and all of the allegations thereof and specifically denies that the defendant is indebted to the plaintiff in the amount of \$603.75 or in any other amount whatsoever.

Wherefore, having fully answered, the defendant prays that this action be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ FRANK PELLEGRINI,

Assistant U. S. Attorney.

Copy received October 27, 1948.

[Endorsed]: Filed October 28, 1948.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue subpoenas for the following witnesses on behalf of plaintiff:

Harry Leighton, Ass't Marine Superintendant.

Boffman, Principal Marine Supt. Army Transportation subpoenae duces tecum produce Rough Log Book and Permanent Log of Army Transport SS "Goucher Victory."

General Jacobs.

George Merrill, Dispatcher, Marine Supt. Office.

John Miller, T-45 Kenedale.

[In margin] At Seattle Port of Embarkation.

5/13/49.

/s/ MARION GARLAND,
Attorney for Plaintiff.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To General Jacobs, c/o Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the

city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Return on Service

Returned unserved at request of Attorney for Plaintiff.

May 16, 1949.

J. S. DENISE,
U. S. Marshal.

By /s/ DONALD F. MILLER,
Deputy.

Received May 13, 1949, U. S. Marshal, Seattle, Wash.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To George Merrill, Dispatcher, Marine Supt's.
Office, Seattle Port of Embarkation, Seattle,
Wash.

You Are Hereby Comanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Received May 13, 1949, U. S. Marshal, Seattle,
Wash.

Return on Service of Writ acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To Harry Leighton, Asst. Marine Superintendent,
Seattle Port of Embarkation.

You Are Hereby Comanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at ten o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein Wm. P. Thornton is Plaintiff and U. S. A. is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Received May 13, 1949, U. S. Marshal, Seattle,
Wash.

Return on Service of Writ acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA DUCES TECUM

To John Doe (whose true Christian name is unknown) Boffman, Principal Marine Supt., Army Transportation at Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said District, on the 7th day of June A.D. 1949, at 10 o'clock A.M. of said day, and also that you bring with you and produce at the time and place aforesaid Rough Log Book and Permanent Log of Army Transport SS "Goucher Victory" then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May A.D. 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
for Plaintiff.

Return on Service

Received this writ at Seattle, Washington on May 13, 1949 and on May 17, 1949, at Seattle, Washington, I served it on the within-named John Doe Boffman, whose true and correct name is George Boffman, and left a true copy thereof or a subpoena ticket with the person named above.

J. S. DENISE,

U. S. Marshal.

By /s/ EDWARD C. SCULLY,

Deputy.

Received May 13, 1949, U. S. Marshal, Seattle, Wash.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

PRAECIPE

To Millard P. Thomas, Clerk of the Above Court:

You will please issue and deliver to the United States Marshal for service subpoenas for the following named witnesses to appear and testify on behalf of the plaintiff on June 7, 1949.

Capt. Rennie Collinge, 3022 50th S. W., Seattle, Washington.

Nels Berg, 3412 W. 57th St., Seattle, Washington.

Dated this 21st day of May, 1949.

MARION GARLAND,

Attorney for Plaintiff.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA .

To Captain Rennie Collinge, 3022 50th S. W.,
Seattle, Washington.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 24th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND &
FRANK HUNTER,
Attorneys for Plaintiff.

U. S. Marshal's Civil Docket No. 20280.

Return on Service of Writ acknowledged.

Received May 24, 1949, U. S. Marshal, Seattle,
Wash.

[Endorsed]: Filed May 26, 1949.

CIVIL SUBPENA

To Nels Berg, 3412 West 57th St., Seattle, Washington.

You Are Hereby Commanded to appear in the District Court of the United States for the Western District of Wash., at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A. M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States of America is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 24th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND and
FRANK HUNTER,
Attorneys for Plaintiff.

U. S. Marshal's Civil Docket No. 20280.

Received May 24, 1949, U. S. Marshal, Seattle, Wash.

· No. 2046

Western District of Washington—ss.

I hereby certify and return, that on the 24th day

of May, 1949, I received the within Civil Subpena and that after diligent search, I am unable to find the within-named defendant Nels Berg within my district.

Reported by his Wife that Nels Berg is enroute to Japan not expected back for about two months.

J. S. DENISE,
United States Marshal.

By /s/ JAMES BRIDGES,
Deputy United States
Marshal.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant above named and respectfully moves the court to dismiss the above-entitled action upon the following grounds:

I.

This court is without jurisdiction of the subject matter of this proceeding, which has been instituted under the provisions of the Tucker Act.

II.

That plaintiff is an "officer of the United States" and is excluded by the express provisions of the

Tucker Act from bringing this action to recover "compensation for official services of officers of the United States."

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM ON
ON MOTION TO DISMISS

While defendant has answered plaintiff's complaint, the question at the threshold is as to this court's jurisdiction of the subject-matter of the action.

The suit has been commenced under the provisions of the Tucker Act, Title 28, U.S.C., 1346(d2). (Old Title 28, U.S.C., 41(20)).

It is therein provided (Sec. 1346(d2)):

"(d) The district court shall not have jurisdiction under this section of

(1) * * *

(2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States."

Plaintiff Is An Officer of the United States

The meaning of the words "Officer of the United States" is to be found in Art. 2, Sec. 2, Clause 2, of the Constitution.

Clause 2 (with respect to the powers of the President) reads:

"* * * and he shall nominate, and by the advice and consent of the Senate shall appoint Ambassadors * * * and all other officers of the United States, whose appointments are not otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of inferior officers, as they think proper, in the President alone, and the Courts of Law, or in the Heads of Departments."

The United States Supreme Court has considered the meaning of the above provisions of the Constitution and the Tucker Act at length in the cases of *United States v. Hartwell*, 73 U. S. 385; *United States v. Germa*, 99 U. S. 508; *United States v. Mouat*, 124 U. S. 303 and *Burnap v. United States*, 252 U. S. 512.

In *United States v. Hartwell*, *supra*, the General Appropriation Act of July 23, 1866, authorized the Assistant Treasurer at Boston, with the approbation of the Secretary of the Treasury, to appoint a clerk. The court held that the defendant "was appointed by the head of a department within the meaning of the constitutional provision" and was an officer. At p. 393, the Court said:

“An office is a public station or employment conferred by the appointment of government. The term embraced the idea of tenure, duration, emolument and duties.”

In *Kennedy v. United States*, 146 F(2) 26, a decision of the Fifth Circuit Court of Appeals in April, 1944, a Junior Instructor of Shop Mathematics of the Air Corps at large was held an “officer of the United States” within the meaning of Art. 2 Sec. 2 of the Constitution and the Tucker Act, Title 28, U.S.C. 41(20) and plaintiff’s suit to recover fees, salary and compensation for official services was dismissed. The court there said (p. 28):

“The stipulated facts show that while appellant was appointed by a subordinate executive officer, his appointment was made with the approval of the Secretary of the War Department, acting pursuant to Acts of Congress which authorized the position to which appellant was appointed and appropriated funds for the payment of the salary therefor. Appellant’s appointment was for an indefinite period and his duties were set forth in an official manual issued by the War Department under express statutory authority.”

The complaint in the instant case alleges in the first paragraph thereof, inter alia:

“* * * That plaintiff is pursuing a claim against the United States of America for service pay while serving as night mate aboard an Army Vessel, that is, on the *Cocher Victory*, for several weeks * * *.”

It is therefore respectfully submitted that this

Honorable Court is without jurisdiction of this action and the same should be dismissed.

Respectfully submitted,

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

CIVIL SUBPENA

To John Miller, T-45 Kenedale, Seattle Port of Embarkation, Seattle, Wash.

You Are Hereby Commanded to appear in the District Court of the United States for the Western Dist. of Washington, at the courthouse in the city of Seattle, in said District, on the 7th day of June, A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein William P. Thornton is Plaintiff and United States is Defendant.

Witness, the Honorable John C. Bowen, District Judge of the United States, this 13th day of May,

A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND,
For Plaintiff.

Received May 13, 1949, United States Marshal,
Seattle, Wash.

Return on Service of writ acknowledged.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

PETITION FOR AN ORDER GRANTING
LEAVE TO PLAINTIFF TO TRANSFER
THIS ACTION TO THE ADMIRALTY
SIDE OF THE COURT

Comes Now the plaintiff, William P. Thornton, and respectfully petitions this Honorable Court for an order granting leave to him to amend his action at law herein to invoke the jurisdiction of this court in admiralty under the provisions of the Public Vessels Act 46 U.S.C.A. Section 781, et seq. Plaintiff respectfully represents to the court that this cause of action has proceeded as an action of law to the point where the taking of evidence has been

concluded and question has arisen as to whether plaintiff has shown that this court has jurisdiction of his claim for services rendered under the provisions of the Tucker Act 28 U.S.C.A. Section 1346-D-2 or whether plaintiff should seek for relief under the Public Vessels Act 46 U.S.C.A. Section 781 and plaintiff's counsel now being satisfied that jurisdiction should be invoked under the Public Vessels Act he now tenders an amended libel in personam against the United States for filing.

Wherefore, plaintiff prays that his petition be granted and that any and all further proceedings herein be transferred to the admiralty side of the court.

/s/ MARION GARLAND, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

NOTICE OF HEARING ON PETITION FOR
LEAVE TO TRANSFER THIS CAUSE TO
THE ADMIRALTY SIDE OF THE COURT

To: J. Charles Dennis, United States Attorney and
John E. Belcher, Assistant United States At-
torney
and

To: Millard Thomas, Clerk of the Court:

You and each of you will hereby take notice that the plaintiff on Monday, July 11, 1949, at 10:00

A. M. or as soon thereafter as counsel may be heard will present to the Court plaintiff's petition seeking an order of said court granting leave to plaintiff to file an Amended Libel in Personam against the United States and transferring any and all further proceedings herein to the admiralty side of said court; copy of which petition along with proposed amended libel is hereto attached and the Clerk will please note this motion on a motion calendar of said court.

/s/ MARION GARLAND, JR.,

Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

AMENDED LIBEL IN PERSONAM
FOR WAGES

To the Honorable Judge of the United States District Court, Western District of Washington, Northern Division:

In Admiralty

The libel of William P. Thornton, against the United States of America, in a cause of contract and wages, civil and maritime, respectfully shows:

First: That upon information and belief at all times herein mentioned the respondent, the United States of America, was the owner of the United

States army transport, Goucher Victory, a public vessel, on Puget Sound and not a merchant vessel.

Second: That libelant is a citizen of the United States of America and at all times herein mentioned was and is a resident of Bremerton, Kitsap County, Washington, within the jurisdiction of this court. That libelant is pursuing a claim against the United States of America for service pay while serving as night mate and watchman aboard an army vessel, that is on the Goucher Victory, a public vessel, for several weeks and this court has jurisdiction of libelant and of his claim of unpaid damages and of this suit under and by virtue of the Suits in Admiralty Act of March 9, 1920 46 U.S.C.A. Section 741 et seq.; and the Public Vessel Act 46 U.S.C.A. Section 781 et seq.

Third: That from July 10, 1947, to August 14, 1947, for a period of thirty five (35) days, plaintiff was employed by the War Department (Army) of the United States of America, at the immediate instance of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, for fifteen hours per day as Night Mate aboard the Army Transport, Goucher Victory, the hours being from 4:30 P. M. in the afternoon until 8:00 A. M. the following morning, at the rate of \$17.25 for a fifteen hour shift, and performing work and rendering services to the respondent which otherwise would have been performed by other *personell*

of the same or similar rating to that of the libelant, whereby the respondent became indebted to libelant in the amount of \$603.75 for services rendered as aforesaid, no part of which has been paid, although duly claimed and demanded by libelant.

Fourth: That libelant was assigned and entered into his duties as Night Mate and watchman under oral contract on the 10th day of July, 1947, and continued employment and rendered services under said contract until and including the 14th day of August, 1947.

Fifth: That libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Section 837 U.S.C.A.

Sixth: That this action is brought pursuant to Public Vessels Act (46 U.S.C.A. Section 781 et seq.)

Seventh: That all and singular the premises are true and in the admiralty and maritime jurisdiction of this honorable court.

Wherefore, libelant prays that a citation in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the respondent the United States of America and that respondent may be required to appear and answer this libel, and all and singular the matters aforesaid, and that this honor-

able court may be pleased to decree payment to libelant by respondent the sum of \$603.75 together with his costs of suit incurred herein and for such further relief as may be just and proper.

/s/ MARION GARLAND, JR.,
Proctor for Libelant.

United States of America,
Western District of Washington,
Northern Division—ss.

William P. Thornton, being first duly sworn on oath says that he is the libelant above named and makes this verification; that he has read the foregoing libel, knows the contents thereof and the same is true to the best of his belief.

/s/ WM. P. THORNTON.

Subscribed and Sworn to before me this 5 day of July, 1949.

[Seal] /s/ MARION GARLAND, JR.,
Notary Public in and for the State of Washington,
residing at Bremerton.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ORDER TRANSFERRING CAUSE
TO ADMIRALTY JURISDICTION

This Matter coming on regularly for hearing and disposition of plaintiff's petition invoking the Admiralty jurisdiction of this Court and praying for

an order transferring this cause to the Admiralty side of this Court and the granting of leave to file a libel in personam against the United States seeking an award of the wages as a seaman for services performed as Night Mate and Watchman aboard the army transport, Goucher Victory, under the provisions of the Public Vessels Act 46 U.S.C.A. Section 781 et seq; and the parties appearing by their respective attorneys of record; and it appearing that this cause has proceeded as a law action under the Tucker Act, 28 U.S.C.A. Section 1346-d-2, and the question has arisen as to whether plaintiff has shown that your Court has jurisdiction of his claim under the Tucker Act, or whether the plaintiff should seek relief under the Public Vessels Act 46 U.S.C.A., Section 781 and the defendant acquiescing in plaintiff's petition; and the plaintiff having tendered, for filing, an amended libel in personam against the United States, and since said tendered libel invokes jurisdiction of this Court under the Suits in Admiralty Act, 46 U.S.C.A. Section 741 et seq; and it further appearing that the vessel involved was a "public vessel" of the United States and not employed as a "merchant vessel", it appears that leave should be granted libelant to amend as prayed so as to invoke jurisdiction under the Public Vessels Act; and the Court being fully advised in the premises;

It Is Ordered and Adjudged that the plaintiff's petition be and same is hereby granted and that any and all further proceedings herein be and same

are transferred to the Admiralty side of this Court.

It Is Further Ordered that the Clerk file said libel in personam and, inasmuch as libelant is a seaman within the designation of persons permitted to sue without furnishing bond or making deposit to secure fees and costs, it is ordered that no such deposit be required of libelant conformable to the provisions of Title 28 U.S.C.A. Section 837; and

It Is Further Ordered that the Clerk, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction do issue process against the respondent United States of America requiring it to appear and answer this libel.

Done in Open Court this 13 day of July, 1949.

/s/ JOHN C. BOWEN,

District Judge.

Approved:

J. CHARLES DENNIS,

U. S. Attorney.

By /s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

Presented by:

/s/ FRANK HUNTER,

Of Counsel for Pltf.

[Endorsed]: Filed July 13, 1949.

CITATION

(No. 15377. Same as No. 2046. Transferred to Admiralty on Court Order 7-13-49.)

Western District of Washington—ss.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, Greeting:

Whereas, a Complaint transferred to Admiralty hath been filed in the United States District Court for the Western District of Washington, on the 7th day of July A.D. 1948, by

WM. P. THORNTON,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

in a certain action, civil and maritime, for payment of services rendered by the said Libellant, amounting to Six hundred three dollars and seventy-five cents, (\$603.75), and praying that a Citation may issue against the said Respondent, pursuant to the rules and practice of this Court:

Now Therefore, We do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your district, that it be and appear before the said District Court, on Wednesday, the 3rd day of August, A.D. 1949, at ten o'clock

in the forenoon of said day, at the Court Room thereof, at Seattle, then and there to answer the said Libel, and to make its allegations in that behalf And have you then and there this writ, with your return endorsed thereon.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in said Western District of Washington, this 14th day of July, A.D. 1949.

MILLARD P. THOMAS,
Clerk.

By /s/ JACK W. KOERNER,
Deputy Clerk.

MARION GARLAND, JR.,
Proctor for Libellant.

Marshal's Return

With Amended Libel in Personam for Wages

Office of U. S. Marshal,
Western District of Washington—ss.

I hereby certify that I served the within Citation at Seattle, Washington, on the 18th day of July, 1949, on the therein named United States of America by then and there delivering to and leaving with J. Charles Dennis, United States District Attorney, at said time and place, a duly certified copy thereof and by mailing by registered mail a true and correct copy thereof in duplicate to the Attorney General

of the United States of America at Washington,
D. C.

J. S. DENISE,

United States Marshal.

By /s/ PATRICK J. BRADLEY,

Deputy Marshal.

Received July 14, 1949, U. S. Marshal, Seattle,
Wash.

Return receipt attached.

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

APPEARANCES OF PROCTORS

To the Clerk of the Above Entitled Court:

You will please enter our appearance as proctors for respondent, United States of America, in the above entitled cause, and service of all serviceable papers, except writs and processes, may be made upon said respondent by leaving the same with the undersigned at their address below stated.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ JOHN E. BELCHER,

Asst. U. S. Attorney.

/s/ VAUGHAN E. EVANS,

Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 4, 1949.

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT, UNITED STATES OF AMERICA, TO LIBEL IN PERSONAM

Comes now the United States of America and excepts to and moves to dismiss the Libel in Personam filed herein for the following reasons:

1. That the libel herein fails to state a cause of action in that there is a specific allegation that the United States of America was the owner of the United States Army Transport Goucher Victory, a public vessel on Puget Sound, and not a merchant vessel, the statute in such case (Title 46, Sec. 741, U.S.C.) providing in part: “* * * a libel in personam may be brought against the United States * * *, provided such vessel is employed as a merchant vessel * * *.”

The foregoing exception is based upon the files and records herein.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

/s/ VAUGHAN E. EVANS,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 4, 1949.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

This suit is brought under the Suits in Admiralty Act (46 U.S.C.A., 741 et seq.) and the Public Vessels Act (46 U.S.C.A., 781 et seq.). The former provides (Sec. 742):

Libel in Personam

In cases where if the vessel were privately owned or operated * * * a proceeding in Admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel. * * * The Libelant shall forthwith serve a copy of his libel upon the United States Attorney * * * and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing.”

In his complaint, libelant, in Paragraph 1 alleges:

“That upon information and belief at all times herein mentioned, the respondent United States of America was the owner of the United States Army Transport Goucher Victory, a public vessel, on Puget Sound and not a merchant vessel.”

Under this allegation then, libelant does not bring himself within the provisions of the Suits in Ad-

miralty Act, and this Court is therefore without jurisdiction in the premises.

The Public Vessels Act (46 U.S.C.A., 781 et seq.) is not applicable here because that Act by its terms applies only to suits in Admiralty in suits for damages caused by or for towage or salvage services.

It is, therefore, respectfully submitted that the motion interposed by respondent to dismiss, should be granted.

Respectfully submitted,
/s/ J. CHARLES DENNIS,
U. S. Attorney.
/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed August 9, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This Matter having come on regularly to be heard before me on the 9th day of July, 1949; the plaintiff having been present in court and represented by his attorneys, Marion Garland, Jr. and Frank Hunter, and the United States of America having been represented by its attorney, John E. Belcher; the court having heard the testimony of witnesses and the argument of counsel; does hereby make the following

Findings of Fact

I.

That between the dates July 10, 1947 and August 14, 1947, the United States was the owner of an army transport vessel, the Goucher Victory, a public vessel, then on Puget Sound, stationed in the port of Seattle, Washington.

II.

That William P. Thornton, the libelant, is a citizen of the United States of America and at all times since the commencement of this law suit and at all times herein mentioned was and is a resident of Bremerton, Kitsap County, Washington, within the jurisdiction of the above-entitled court. That the libelant claims pay for service while serving as Night Mate and watchman for the army vessel known as the Goucher Victory, owned by the United States of America. That this Court has jurisdiction over the libelant and of the claim for his unpaid wages by virtue of the Public Vessels Act (46 U.S.C.A. Section 781); Court further finds that from July 10, 1947 to August 14, 1947, for a period of thirty-five days libelant was employed by the army of the United States of America, at the request of the Marine Superintendent for the Army at the Port of Embarkation in Seattle, Washington, a person having authority to hire the libelant. The libelant, William P. Thornton, worked a total of 525

hours at the rate of \$1.15 per hour, making a total amount earned by him in the sum of \$603.75. That no amount of said moneys has been paid. That demand has been made for the same.

III.

That the services rendered by William P. Thornton, the libelant, to the United States of America between the dates of July 10, 1947 and August 14, 1947, was that of Night Mate and that said work was necessary work which had to be done for the United States of America. That no other person was hired or designated to do said work. The Court further finds that if the United States Government did not pay the libelant, William P. Thornton, for said work, it would be an unjust enrichment of the United States of America. The Court further finds that the United States, knowing that William P. Thornton, the libelant, was doing the work of Night Mate, allowed him to do said work, accepted said work and received the benefits thereof. That by said acts they created a contract of employment and promised to pay for the service rendered by the said William P. Thornton.

From the foregoing Findings of Fact, the Court does hereby make the following

Conclusions of Law

I.

That the above entitled Court has jurisdiction over the libelant and over the respondent by virtue

of the residence of the respondent and the Public Vessels Act (46 U.S.C.A. Sec. 781).

II.

That the libelant should receive judgment against the respondent in the sum of \$603.75, together with interest at the rate of six percent (6%) per annum from date of entry of decree until paid.

To all of which respondent excepts and exception allowed.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Approved and Presented by Marion Garland.

By /s/ FRANK HUNTER,
Proctor for Libelant.

Approved as to form:

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed August 15, 1949.

In the District Court of the United States in and
for the Western District of Washington, North-
ern Division

In Admiralty No. 15377

WILLIAM P. THORNTON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This Cause coming on regularly for trial and hearing before the Honorable John C. Bowen, Judge of the above-entitled court, the libelant, William P. Thornton, appearing in person and with his Proctors of record, the respondent, the United States of America, appearing by the United States Attorney and by John E. Belcher, Assistant United States Attorney; witnesses were duly sworn and testified, and oral testimony and documentary evidence was received on behalf of libelant and respondent, and after argument by counsel, the Court rendered its decision, finding the issues generally in favor of the libelant against the respondent; and Findings of Fact and Conclusions of Law having been duly entered of record and the Court now being fully advised in the premises, it is

Ordered, Adjudged and Decreed that the libelant does have and recover judgment against the respondent in the principal sum of \$603.75, together

with interest at the rate of six per cent (6%) per annum from date of entry of this decree.

To all of which respondent excepts and exception allowed.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Approved and Presented:

By /s/ FRANK HUNTER,
Proctor for Libelant.

Approved as to form:

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William P. Thornton, libelant, and Marion Garland, Jr., his proctor; and to the Honorable John C. Bowen, Judge, and Millard P. Thomas, Clerk of the above-entitled Court:

You and each of you will please take notice that the United States of America, respondent in the above-entitled cause, hereby appeals from that certain Decree entered on the 15th day of August, 1949, in the above-entitled cause, wherein the Court

ordered, adjudged and decreed that the libelant recover judgment against the United States of America in the sum of \$603.75, with interest thereon at the rate of 6% per annum from date of entry of the Decree, hereby appealing from the whole of the said decree and each and every part thereof, unto the United States Court of Appeals for the Ninth Circuit.

Dated this 8th day of November, 1949.

/s/ J. CHARLES DENNIS,
U. S. Attorney,

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1949.



[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above-Entitled Court:

Utilizing the Transcript of the Record filed herein you are hereby requested to prepare in the above-entitled cause, Apostles on Appeal to the United States Court of Appeals for the Ninth Circuit, supplementing and comparing the transcript to the extent necessary to make index and certify full, true and complete Apostles on Appeal as required by the Admiralty Rules of that court containing the following:

1. Caption showing proper style of the Court and showing title and number of the cause.

2. Introductory statement showing commencement of the action as one of a civil nature, being cause number 2046, names of all parties and addresses of all counsel, dates of filing all pleadings, including motion to dismiss, order transferring to Admiralty, name of trial Judge, dates of trial, date of final decree, date when notice of appeal was filed.

3. The Complaint (Civil No. 2046).

4. The Defendant's Answer.

5. Motion to Dismiss.

6. Petition for order of transfer to Admiralty.

7. Notice of hearing on motion to transfer.

8. Order granting motion for transfer to Admiralty.

9. Amended Libel in Personam (No. 15377).

10. Appearance of Proctors for Respondent.

11. Exceptions of Respondent to Libel in Personam.

12. Findings of Fact and Conclusions of Law.

13. Decree.

14. Notice of Appeal.

15. All testimony of all witnesses taken in open court in both causes 2046 and 15377 with all ex-

hibits in connection with such testimony, including the following exhibits:

- (a) Plaintiff's Exhibit 1—Discharge.
- (b) Plaintiff's Exhibit 2—Letter April 13, 1948.
- (c) Defendant's Exhibit A-1—Application for Refund.
- (d) Defendant's Exhibit A-2—Time sheet.
- (e) Defendant's Exhibit A-3—Informal buck slip.
- (f) Defendant's Exhibit A-4—Circular re personnel.
- (g) Defendant's Exhibit A-5—Delegation of authority.
- (h) Defendant's Exhibit A-6—Order C.

16. This Praecipe.

/s/ J. CHARLES DENNIS,
U. S. Attorney,

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent, United States of America, hereby respectfully assigns error in the proceedings before the Court and in the Judgment and Decree entered and filed on the 15th day of August, 1949, as follows:

1. That the Court erred in awarding to libelant a recovery in the total sum of \$603.75 or any other sum whatever.

2. That the Court erred in allowing the libelant to recover under Public Vessels Act.

3. That the Court erred in allowing the plaintiff recovery of interest in excess of 4%.

/s/ J. CHARLES DENNIS,

U. S. Attorney,

/s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States

District Court for the Western District of Washington, do hereby certify that I am transmitting as the apostles on appeal in the above-entitled cause, all of the original pleadings and testimony on file in said cause, together with Libelant Exhibits 1 and 2 and Respondent Exhibits A-1 to A-6, inclusive, offered in evidence at the trial of said cause, to wit:

1. Complaint.
2. Praecipe.
3. Marshal's Return on Summons.
4. Appearance of Defendant.
5. Answer of Defendant.
6. Praecipe for subpoenas to Harry Leighton, et al., on behalf of plaintiff.
7. Marshal's Return on subpoena (Jacobs).
8. Marshal's Return on subpoenas (Merrill, et al.).
9. Marshal's Return on subpoenas (John Doe Hoffman).
10. Praecipe for subpoenas, Collinge, et al.
11. Marshal's Return on subpoena (Collinge).
12. Marshal's Return on subpoena (Berg).
13. Motion defendant to Dismiss.
14. Defendant's Memorandum on Motion to Dismiss.
15. Marshal's Return on subpoena (Miller).

- 15a. Petition for Order Granting Leave to Plaintiff to Transfer Action to Admiralty Side of Court.
16. Notice of Hearing on Petition for Leave to Transfer Cause to Admiralty Side of Court.
- 16a. Amended Libel in Personam for Wages.
17. Order Transferring Cause to Admiralty Jurisdiction.
18. Marshal's Return on Citation.
19. Appearance of Proctors for Respondent United States.
20. Exceptions of Respondent to Libel in Personam.
21. Respondent's Trial Memorandum.
22. Findings of Fact and Conclusions of Law.
23. Decree for Libelant.
24. Notice of Respondent of Appeal.
25. Reporter's Transcript of Proceedings at Trial.
26. Praecipe for Apostles on Appeal.
27. Assignments of Error.
28. Affidavit of Service.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 13th day of December, 1949.

MILLARD P. THOMAS,

Clerk,

[Seal] By /s/ TRUMAN EGGER,

Chief Deputy.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 15377

WILLIAM P. THORNTON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

June 22, 1949, 10:00 o'Clock A.M.

Appearances:

MARION GARLAND and
FRANK HUNTER

appearing for and on behalf of plaintiff.

JOHN E. BELCHER,

assistant United States Attorney, appear-
ing for and on behalf of defendant.

The Court: I understand there is a motion
pending.

Mr. Belcher: There is a motion pending, if Your
Honor please. This is a suit brought under the
Tucker Act, as is clearly shown by the pleadings,
and we have interposed a motion to dismiss upon

the ground that the Court is without jurisdiction of actions of this type under the Tucker Act. The Statute is Section 1346 of the new title 28 of the code, "District Courts will have original jurisdiction concurrent with the Court of Claims . . ." Then it sets out certain things under subdivision (d) "The District Court shall not have jurisdiction under this section of (1) any civil action or claim for a pension, (2) any civil action to [2*] recover fees, salary, or compensation for official services of officers of the United States."

We are not without authority for the position we are taking, if Your Honor please. The United States Supreme Court has considered the meanings of the provision of the Constitution and of the Tucker Act in the case of *United States vs. Hartwell*, 73 U.S. 385, *United States vs. Germa*, 99 U.S. 508, *United States vs. Mouat*, 124 U.S. 303, and *Burnap vs. U. S.*, 252 U.S. 512.

In the *Hartwell* case, the General Appropriation Act of July 23, 1866, authorized the Assistant Treasurer at Boston, with the approbation of the Secretary of the Treasury, to appoint a clerk. The Court held that the defendant "was appointed by the head of a department within the meaning of the Constitutional provision" and was an officer. At page 393, the Court said: "And office is a public station or employment conferred by the appointment of government. The term embraced the idea of tenure, duration, emolument and duties."

* Page numbering appearing at bottom of page of original Reporter's Transcript.

In *Kennedy vs. United States*, 146 F. (2) 26, a decision of the Fifth Circuit Court of Appeals in April, 1944, a junior instructor of shop mathematics of the Air Corps at large was held an "officer of the [3] United States" within the meaning of Art. 2, Sec. 2, of the Constitution and the Tucker Act, and plaintiff's suit to recover fees, salary and compensation for official services was dismissed. The Court there said, page 28: "The stipulated facts show that while appellant was appointed by a subordinate executive officer, his appointment was made with the approval of the Secretary of the War Department, acting pursuant to acts of Congress which authorized the position to which appellant was appointed and appropriated funds for the payment of the salary therefore. Appellant's appointment was for an indefinite period and his duties were set forth in an official manual issued by the War Department under express statutory authority."

The complaint in the instant case alleges in the first paragraph: ". . . that plaintiff is pursuing a claim against the United States of America for service pay while serving as night Mate aboard an Army vessel, that is, on the *Cocher Victory*, for several weeks"

If Your Honor please, I think the remedy of the plaintiff in this case was in admiralty and not under the Tucker Act. A suit of this type cannot be brought under the Tucker Act.

The Court: In other words, this is an instance

of [4] the United States of America being a private employer, is that right?

Mr. Belcher: That is right.

The Court: Does the Merchant Marine Act have any specific provisions touching this subject matter?

Mr. Belcher: I think not, Your Honor.

The Court: Does the War Shipping Act or any other acts which relate to the ownership and operation of merchant vessels by the United States have any purported specific provisions that might be contended to be applicable to this situation?

Mr. Belcher: I think not, Your Honor. The ship on which the plaintiff alleges that he performed the service was an Army tug, a ship of the United States assigned to the United States Army.

The Court: I think that this matter is of sufficient importance to justify the Court in reserving ruling on this motion until after the Court hears the testimony in the case on the merits. While you may think that that could be and is to be a loss of time on the part not only of the Court but also of counsel in the case, I am inclined to think it is a better policy.

At the moment, from what counsel has said, I do not feel as clearly convinced of counsel's position as [5] he does, and I feel I should have an opportunity to consider it more, and I can do that best in connection with the hearing of the case on the merits. I will reserve ruling on this motion at least until the close of all the evidence on both sides, and if the Court is requested at that time to again consider it, the Court will do so.

Mr. Belcher: I will reserve argument until that time.

The Court: I think that would be a better economy of time.

Whereupon, opening statement having been made by counsel for plaintiff, the following proceedings were had and done, to wit:

The Court: You may call plaintiff's first witness.

WILLIAM P. THORNTON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [6]

Direct Examination

By Mr. Garland:

Q. Would you give your name, please?

A. William Patrick Thornton.

Q. What is your address?

A. I live in Bremerton, 935 Summit Avenue North, Bremerton, Washington.

Q. What is your occupation at the present time?

A. At this time I am not doing anything.

Q. On July 10, 1947, what was your occupation?

A. I was employed as night Mate on the United States Army transport Goucher Victory.

Q. How did you secure that employment?

A. Called on Captain Leighton and received the position from him.

The Court: How do you spell the word Goucher?

The Witness: G-o-u-c-h-e-r, I believe.

(Testimony of William P. Thornton.)

The Court: I wonder if the spelling of it in the complaint is not erroneous.

Mr. Garland: There is a "U" left out in the complaint, Your Honor.

The Court: The correct spelling is G-o-u-c-h-e-r Victory?

Mr. Belcher: That is correct, Your Honor.

Q. What position did Captain Leighton hold, the man [7] who employed you?

A. Captain Leighton was the Assistant Marine Superintendent.

Q. As a result of the conversation with Captain Leighton, what did you do?

A. Ask that question again.

Q. As a result of the conversation with him, and hiring you, what did you do?

A. I should go back, a little back of Captain Leighton, if you would like it that way.

The Court: It is a question of who was the man who said the word that put you to work, because probably we will want to know what his official position was.

The Witness: Mr. Merrill is the man.

Q. Mr. Merrill put you to work?

A. George Merrill is the name.

Q. Was Captain Leighton an officer of the United States? Was he working for the United States at this time?

A. George Merrill was the dispatcher, I believe.

Q. Who was the first man you contacted?

(Testimony of William P. Thornton.)

A. The first man was Miller.

Q. Was he working for the Port of Embarkation at this time? A. Yes. [8]

Q. What was his position?

A. He was assistant to the head of personnel, in charge of the giving out of jobs to the different deck departments.

Q. What conversation did you have with Miller?

A. I came down to ask him for a job, to the Goodrich Building, and he wasn't in the office so I came out and met him in front of Pier 39. I said, "Say, Miller, what is the chances of my getting one of those night Mate jobs?" He said, "I don't handle that down here any more. Colonel Jennings is the man. In fact," he said, "Captain Leighton is the man you will have to see." So I said, "All right, I know Harry very well," and I went up to Captain Leighton's office and asked him for the position.

Q. What conversation did you have with Captain Leighton? A. What conversation?

Q. Yes.

A. I said, "Harry, I'd like to get one of those night Mate jobs," and he says, "Certainly, Bill, why not? Have you been terminated?" I said, "Well, I don't know. I haven't received a discharge yet." "Well," he says, "we can fix that, I guess. Go out and give your name to George Merrill who is just sitting in the next office."

So I put my name down, and George says, "You

(Testimony of William P. Thornton.)

will have [9] to pay for the long distance call. That will be 35 cents." And I said, "That will be all right." So he said, "All right," and I left the office, and I had only been gone possibly three minutes and a messenger came running after me and he said, "Merrill wants to see you." I came back to Merrill's office and he said, "Will you go on the Goucher Victory?" I said, "Why not? Why, certainly a job is a job for me." He said, "You be down here at four o'clock on July 10." Those were the words that were used.

Q. Was there any discussion as to the amount of pay that you were to receive?

A. About the pay?

Q. Yes.

A. Well, I knew what the pay was.

Q. What was the pay? What were you to be paid?

A. What would I be paid?

Q. Yes.

A. \$17.25 a day for a fifteen-hour shift.

Q. Did you go to work on the Goucher Victory?

A. I did.

Q. What date was that?

A. That was on the 10th day of July, at 4:30 in the afternoon.

Q. How long did you work on the Goucher Victory?

A. Until August 14th, at 8:00 o'clock in the morning. [10]

Q. Is that 1947?

(Testimony of William P. Thornton.)

A. That is 1947, yes.

Q. What position did you hold?

A. The Army transport called it the night Mate.

Q. Did they require that you have any papers or commissions of any kind?

A. No, my papers were never called on at all.

Q. What were your duties?

A. To stay aboard the ship from 4:30 in the afternoon until 8:00 in the morning.

Q. What did you do aboard the ship?

A. I was in charge of the vessel. It was my duty to see the ship was taken care of in every way.

Q. Was there any other person performing a similar duty to that which you had on that ship?

A. Not at that time.

Q. Were you familiar at the time with the manner in which all the ships that were tied up were being handled by the Port of Embarkation?

A. Ask it again.

Q. Were you familiar with the way the other ships were being handled at the Port of Embarkation?

A. Well, I knew—I had been with the Port for five years.

Q. Did the other ships tied up there have night Mates? [11]

A. The other ships had Mates of the same kind, holding the same kind of position, I mean.

Q. During the time you were working, did you have any further conversations with any of the

(Testimony of William P. Thornton.)

authorities from the Port of Embarkation about your position or your job?

A. Not in regard to the vessel, any more than occasionally. One time she was anchored out in the bay for four or five days and I would come to the Marine Superintendent's office and they would send me out with a tug.

The Court: Ask him questions that will develop the fact as to where the ship was during the time he worked on it.

Q. Where was the ship, Captain?

A. She was first at the Port of Embarkation.

The Court: Where? What city?

The Witness: Seattle.

Q. Here in Seattle?

A. Here in Seattle, yes.

Q. Where was it moored in Seattle, at what pier?

A. I believe 37, first, and then we were shifted to the anchor in the stream, and from there we were shifted to Pier 65, 64 or 65.

Q. That was all in Seattle, Elliott Bay?

A. That was in Seattle, Elliott Bay.

The Court: The last pier was what? [12]

The Witness: I think she was shifted to 65, 64, and then shifted to 65. She was doing some repair work.

Q. Were you directed to where the ship was moored each time?

A. No, I had nothing to do with the direction of the ship when she was being moored.

(Testimony of William P. Thornton.)

Q. How did you find out where the ship was?

A. I was on board when she went each time, with the exception of going out to the bay. I went to the Marine Superintendent to find out where she went out into the bay. After that, I knew where she was because I was on board when she was shifted.

Q. Did you have to give any evidence that you were on board the ship? A. Oh, yes.

Q. What were the actions that you went through to show that you were on board the ship?

A. I reported to the officers of the ship on coming aboard, and when leaving in the morning an officer relieved me.

Q. Did your position build up any leave or retirement pay of any kind?

A. No. That come under a different head, so I was told.

Q. You were told by whom? [13]

A. That wasn't Merrill, it was Amdahl.

Q. What position did Mr. Amdahl hold?

A. Mr. Emdahl was acting directly under Mr. Thomas. I think he was the head, and I believe Merrill was the next in rank.

Q. That is manager of the Port of Embarkation?

A. Of personnel, yes.

Q. In Seattle, Washington? A. Yes.

Q. What was your length of employment? How long were you employed and when were you employed?

(Testimony of William P. Thornton.)

A. You mean during the night mate job?

Q. How could your work be terminated? Did you have any given time of employment?

A. I don't get that.

Q. If the Government saw fit to dispense with your services, how much notice did they have to give you?

A. All I was given at the morning of the 14th, I met John Miller as I was leaving the ship and he asked me, "Are you on the Goucher Victory?" I said, "Yes," and he said, "Did you go through here?" And I said, "Why, no," so he left and I left. I went on home to Bremerton and on arrival there was a telephone message to come right straight back to the Port and then Captain Leighton told me that that would be all for the time being, until this thing was straightened out. [14]

The Court: What thing did you understand he referred to?

The Witness: I suppose on my being employed.

The Court: What kind of a problem was involved with that? What kind of problem was to be straightened out, if you know?

The Witness: They told me since that time that I had been terminated, and I should go through the processing and through the personnel again, but at that time I had not received a discharge and did not receive one until several months afterwards.

Q. What I am getting at, Captain, is, could you

(Testimony of William P. Thornton.)

have been discharged at any time on that position?

A. Yes.

Q. You didn't sign up for a length of the cruise or so many years?

A. All that would have been necessary was to say, 'You're all through.'

Q. How much money did you have coming to you at the time you were notified you were through?

A. Six hundred three dollars and some odd cents, seventy-five cents, I believe.

Q. Seventy-five cents, would that be right?

A. I think that was it.

Q. Did you ever make a demand for that money?

A. Yes, more than a dozen different occasions.

Q. To whom did you make the demand?

A. Several times to Mr. Roscoe Thomas. I went finally to Colonel Witt. I went to Captain Leighton.

Q. Were these all officers of the Port of Embarkation? A. Yes.

Q. And what did they say to your demand?

A. They told me I shouldn't have been working.

Q. Did you ever get paid?

A. For this last?

Q. Yes. A. No.

Mr. Garland: I have no further questions.

Cross-Examination

By Mr. Belcher:

Q. Captain, at the time you first entered the employ of the United States Government, what process did you have to go through?

(Testimony of William P. Thornton.)

A. I had to be——

Q. Do you recall having had to make a written application? A. Yes.

Q. Do you recall having to take a physical examination? [16] A. Yes.

Q. Do you recall having been fingerprinted?

A. Yes.

Q. And where was all this done?

A. At the Port of Embarkation.

Q. In what office?

A. In the personnel division.

Q. Now, the 8th of May, 1942, was the first time you were hired? A. That is right.

Q. You served as First Mate on the Monarch?

A. That is true, Pacific Monarch.

Q. That service terminated on that ship June 15, 1942? A. Yes.

Q. Then you were Third Mate on the VMC, do you recall that, from June 23, 1942, to July 6, 1942?

A. Yes.

Q. Then you were Master of the Funston, were you not? A. Yes, sir.

Q. That was from July 7, 1942, to September 7, 1942? A. I believe that is the time.

Q. Then you were on the O'Hara as Master, were you not? A. Yes, sir. [17]

Q. From September 8, 1942, to October 4, 1942?

A. Yes.

(Testimony of William P. Thornton.)

Q. Then you were on the VMC again as First Mate? A. Yes.

Q. From October 5, 1942, to December 28, 1942, is that correct? A. Right.

Q. Then you were on the Teapa, were you not, as Master? A. Ask that again.

Q. Then you were on the Teapa, as Master?

A. Oh, the Teapa.

Q. You were Master of that ship from January 20, 1944, until November 25, 1944?

A. That is true.

Q. You were not employed between October 4, 1942, and December 28, 1942, until January, '44, a period of almost a year and a half?

A. I was on sick leave, I believe.

Q. Then after that, your next employment was as second officer on the Hoyle? A. Yes.

Q. That was from February 1, 1945, until April 12, 1945, isn't that correct?

A. I believe that is. [18]

Q. Then you were Master of the Hoyle from April 13, 1945, to June 28, 1945?

A. I believe that is right.

Q. Do you remember being Master of the Sierra?

A. No, I have never been Master of the Sierra, not to my knowledge.

Q. Were you on the Sierra as Master from June 29, 1945, to July 23, 1945?

A. I was pilot on the Sierra.

(Testimony of William P. Thornton.)

Q. Well, as pilot, you were Master of the ship, were you not?

A. No. The pilot is the pilot, the Master is the Master.

Q. Do you remember being on the FS 31?

A. Yes, sir.

Q. Were you Master of that ship?

A. I was.

Q. And that service was from July 24, 1945, to May 15, 1946?

A. I believe that is right. I am not certain of those exact figures, but it is close around there.

Q. Then you were Master of the Q 137, were you not?

A. 137, yes.

Q. That was from June 6, 1946, to August 10, 1946, is that correct? [19]

A. Well, I just can't remember the exact dates, but, however, I was Master of the ship.

Q. Well, you did serve later as Master of the J 2139?

A. Yes.

Q. And do you recall that was in the month of November, 1946?

A. I can't remember just the exact dates I have the discharges at all.

Q. Do you remember being Master of the J 299?

A. Yes.

Q. And that was in the year '46, wasn't it?

A. I believe so.

Q. Were you Master of the T 45?

A. No, not the C 45.

(Testimony of William P. Thornton.)

Q. On the T 45?

A. I was Master of one of those little fellows.

Q. That was during '47, you were on a ship in '47?

A. Yes.

Q. Do you remember being pilot on the SF 210, in February——

A. No, I was not pilot.

Q. You applied for the position, didn't you?

A. I was never assigned to the 210.

Q. That position was offered to you, was it not? But you didn't accept it? [20]

A. Yes, it was.

Q. Do you remember why you didn't accept it?

A. No, I'll tell you, to go into detail, there is so many things happening on the 210 that——

Q. You didn't want to take orders from an Army captain, isn't that it?

A. I would have been glad to hold the position of pilot of the 210 under different conditions.

Q. You would have to take instructions from an Army captain?

A. That would make no difference to me. The Army captain that came there was a very wonderful young fellow.

Q. Had you not asked for the position on the 210?

A. No, that came to me by different other people.

Q. Isn't it a fact that you refused to take that ship?

A. I did under the conditions I said.

Q. Isn't it a fact that you wouldn't take the

(Testimony of William P. Thornton.)

position because the salary was lower than you had been getting? A. That is not true.

Q. Then you asked for sick leave because of an injury to your shoulder? A. That is true.

Q. And you were granted that sick leave? [21]

A. I was.

Q. How long was that?

A. Well, it continued through until finally I was terminated. I came down and called on Mr. Miller on different occasions, and the last time I came to him I said, "Where are you going to put me?" "Well," he said, "I don't know. I have got to put you to work some place. I may have to send you down to Portland."

Q. At the time you were granted sick leave for the injury to your shoulder and arm, you went to the Marine Hospital, didn't you? A. Yes.

Q. You were discharged, weren't you, from the hospital as O. K.?

A. No, I was never discharged from there.

Q. Do you remember being offered the position of Master aboard different tugs that were being operated by the Army?

A. I was offered, yes, and at that time I said, "Not at this time."

Q. You wouldn't take it because it required 24 hours service, isn't that correct?

A. No, that isn't true. I said, "I don't care about taking that kind of a job at this time," but later on I told them I would take one of those jobs.

(Testimony of William P. Thornton.)

Q. Then you were granted an additional 15 days annual leave, were you not?

A. No, here is the way that was. I came down, as I said, to Mr. Miller, and he said, "I've got to put you to work." I says, "I'll tell you, my son is going to be married down in Dallas, Texas, and I would really like to make a trip down there, and if it is satisfactory with you I would like to have a little extra time off." He said, "All right, go ahead. I am leaving your permit open anyway, and come back and see me when you get back."

Q. You were terminated, were you not?

A. Well, I guess I was.

Q. Do you remember the date?

A. No, I don't say that I do.

Q. Would you say it was not the 9th day of May, 1947?

A. No, I wouldn't say that. I would have to look and see. In fact, I was told I was going to be terminated because I wasn't capable—I wouldn't say it was capable—"the ships that you have been on have been laid up and it is necessary to terminate you." I believe those were the words, I just can't recall it at this time.

Q. At the time you terminated your service on each one of the tugs or ships that I have mentioned between 1942 and 1946 or 1947, what process did you have to go through each time you took a new ship? Were you required to go [23] through personnel?

(Testimony of William P. Thornton.)

A. In the start—well, in the start you had to do that every time you changed a position. You had to be fingerprinted, but in the last part, you didn't have to.

Q. What last part?

A. That is in the start of the war, but after the war was over it was quite different. In fact, when I came out to Silverado and was made Assistant Marine Superintendent, to my knowledge, I wasn't fingerprinted at all.

Q. That is when you took this night Mate job?

A. Just told to go to another position.

Q. You didn't attempt to go through the personnel office at the time you took this job as night Mate, did you?

A. I came to the personnel and asked for Miller and he was out at that time. After waiting probably 20 minutes, I said, "I'll take a little walk out through the yard," and I met Miller in front of Pier 39 and I asked him for the night Mate's job. He said, "We don't handle that at all down here any more. That is all changed over." I says, "Who does it?" He said, "Colonel Jennings. In fact, Captain Leighton is the man you would have to see." I said, "All right, Harry is a friend of mine. I have known him for a long time. I will go and see him," and that is the way it turned out.

Q. As a matter of fact, at this time, you say Captain Jennings put you to work? [24]

A. No, Captain Jennings didn't.

(Testimony of William P. Thornton.)

Q. But he employed you? A. No.

Q. Who employed you?

A. I came to Captain Leighton and after talking with Captain Leighton, he sent me to George Merrill who was on the desk, the dispatcher, I would say.

Q. You knew you had to go through personnel, didn't you?

A. I did not. He told me it was all different, this was all changed, and they had nothing to do with it any more, and I don't know that a night Mate ever had to go through it.

Q. As a matter of fact, after you had been working on the Goucher Victory, didn't you meet Mr. Miller? A. Yes, sir.

Q. And you told him you were working nights on the Goucher Victory, didn't you?

A. I met Mr. Miller almost in the identical spot.

Q. That was only a day or two after you had gone to work?

A. No, no, that was on the 14th day of July.

Q. That was four days after?

A. No, I went on the 14th day of August. I mean, I went to work on the 10th day of July. [25]

Q. Didn't Mr. Miller tell you that you had no right to work on the Goucher Victory without going through personnel?

A. No, he didn't say I had no right to. He didn't use those words.

The Court: What date do you understand counsel

(Testimony of William P. Thornton.)

to be inquiring about? What date with reference to the commencement of your work on the 10th of July?

The Witness: I went to work on the Goucher Victory on the 10th of July, at 4:30 in the afternoon.

The Court: When did you have this conversation that is now being inquired about?

The Witness: That was on the 14th day of August at 8:00 a.m.

Q. It was during the month of May, however, that you were terminated, wasn't it?

A. Well, in some way my discharge was lost, at least I was told that. I was told when I was leaving that my discharge would be sent to me, which I never received.

Q. As a matter of fact, you did receive your discharge very shortly afterwards?

A. I did, about eight months later.

Q. You did receive your discharge papers shortly after you were terminated?

A. No, I never received the papers. [26]

Q. Isn't it a fact that you complained to the Marine Crewing Section office that you were not satisfied with the type of discharge you got?

A. With the type of what?

Q. The kind of discharge you got.

A. I didn't get any.

Q. Isn't it a fact that you wanted a discharge for disability?

(Testimony of William P. Thornton.)

A. When I returned from Dallas, Texas, I got a letter, I believe they have it in the files over there, and it said——

The Court: He is asking you one question and you are answering another question. He is asking you what you said, not what the fact was, but he is asking you what you then said the fact was about a certain subject. Read the question.

(Last question read by reporter.)

The Court: I will withdraw my explanation. Answer the question. Do you understand it?

The Witness: No.

The Court: Ask him another question.

Q. Do you not recall going to the dispensary with Mr. Miller where you were examined by a doctor, Captain Jesse L. Henderson of the Medical Corps? A. I was never——

Q. Just a moment. And didn't the doctor write a [27] letter dated May 9, 1947, to the Chief of the Marine Crewing Section while you were there to Mr. Roscoe Thomas, stating that Mr. Thornton was physically disabled and unfit to continue in the service as Master of Tugs?

A. Not to my knowledge, no. No, that is not true.

Q. Did you not get a discharge for disability?

A. There was a discharge for disability came several months later, and they told me it had some way been lost.

(Testimony of William P. Thornton.)

Q. You made a written application, did you not, on that date in May, 1947 for refund of retirement deductions?

A. That is not true. I never made application of that kind.

Q. Were you paid? A. Paid for what?

Q. Retirement deductions refunded to you?

A. Oh, yes. I received a retirement, yes. I received \$1,400 and some odd dollars for social security.

The Court: When, do you know?

The Witness: I just can't recall the time.

The Court: With reference to the beginning or ending of your work in July or August you are here suing for?

The Witness: It was long after August.

The Court: State how much you got and what it was for, if you know? [28]

The Witness: When I went back to get the social security, I believe I got \$1400. It was \$1400, I know, but I can't say the balance.

The Court: Do you know what it was for, what kind of payment was it for?

The Witness: For money I had paid in social security.

Q. And your retirement pay, or your refund of what you had paid to the retirement fund, was up to and including April 15, 1947, two months prior to the time that you went to work on this tug?

A. No, that is not true.

(Testimony of William P. Thornton.)

The Court: At this point, we will take a five minute recess.

(Recess.)

Q. Captain, at the time in July, 1947 that you made the request for the job as night Mate, you knew, did you not, that there were two employees of the Army who had seniority over you?

A. Two?

Q. Yes. A. More than that.

Q. And the vacancy which occurred for night Mate on this ship should have been filled by men with greater seniority than yourself? [29]

A. No, I didn't know that and I don't believe that is true.

Q. Did you make known to either of the persons you have mentioned, Captain Leighton or George Merrill, that you had been terminated?

A. No, I didn't mention that. I didn't say that. In fact, here is what happened, when I asked Captain Leighton, he said, "Have you been terminated?" I said, "Well, I have never received a discharge, if I have."

Q. Who did you tell that to?

A. Harry Leighton, Captain Leighton, and he said, "Well, that can be fixed."

The Court: Repeat what you last said.

The Witness: "That can be fixed," and shall I continue with what I said?

The Court: Yes.

(Testimony of William P. Thornton.)

The Witness: And he said, "Go on and see Merrill, go out to Merrill and give Merrill your name and address," and Merrill put my name down and said, "Now, Captain, you live in Bremerton. Any long distance telephone calls, the Army does not pay it. You will have to pay it." I said, "That is all right, I will be glad to do that," and left the office. Then I was half way to the Administration Building when a messenger came after me and he said, "Mr. Merrill wants to see you." [30] I came back and Merrill said, "Will you go on the Goucher Victory?" I said, "Why, certainly. A ship is a ship with me." So he said, "Be down here at four o'clock on July 10," and I was.

Q. Did you not know from your previous service with the United States government that once you have been terminated, it is necessary for you to file a new application and go through the same procedure that you did?

A. I did not know that, no.

Q. You did not know that?

A. I was told by Mr. Miller that they have nothing to do with it in personnel, that it was all handled by—he said Colonel Jennings, first, and then he said, "Harry Leighton is the man you will have to see." On that word, I went to see Harry.

Q. Do you remember seeing Mr. John Miller on the 29th of July, 1947?

A. No, sir, that is not true.

(Testimony of William P. Thornton.)

Q. And having a conversation with him at that time?

A. On the 29th? No, sir, that is not true.

Q. And at that time, did he not tell you that you would not receive any pay for the services you rendered?

A. That is not true.

Mr. Belcher: I think that is all. [31]

Redirect Examination

By Mr. Garland:

Q. Captain, when you were examined by a doctor in May, tell the Court what happened?

A. I will have to go back a little bit to see what leads up to it.

The Court: I think, Captain, that you should be able, one of your experience, to answer his question directly. And do not go back into a lot of explanation, because you might say a lot of things that are not material. If he wants you to say them, he will give you a chance to.

The Witness: I came to Mr. Miller's office. After talking a while, he gave me some papers and says, "Take them in to the doctor." There was a sealed envelope, and after sitting in the doctor's office a short time, the doctor took this sealed envelope and opened it, and says, "Now, Captain, what do you want?" I said, "I don't know." He read it over a while and finally signed something and put it in another envelope and give it to me to take back to Miller.

Q. Did you take it back to Miller?

(Testimony of William P. Thornton.)

A. I did.

Q. What conversation did you have with Miller?

A. I passed it to him, and he said, "Now, Captain, [32] these are your papers. I will mail those to you," and they never arrived. They haven't arrived yet, to my knowledge.

Q. Do you know what papers he was referring to?

A. Discharge papers or terminating papers. I guess.

Q. Did you ever go over to the Bureau and ask for your discharge papers? Did you ever go over to Merrill's office and ask for them?

A. I asked Mr. Thomas some time later.

Q. When was that?

A. That was probably six or seven months later.

Q. Later than August, 1947?

A. It was later than that.

Q. It was after August, 1947?

A. Yes, long after.

Q. Was it before you received a copy of your discharge papers?

A. It was, I would say, several months that I went to Mr. Thomas' office and asked him and he says, "We will send those to you, a copy," and I received a copy, I think it was something like several months.

Q. Were they able to find a copy at that time?

A. It was never found, to my knowledge. At one time, they wanted to see a copy and they looked

(Testimony of William P. Thornton.)

in my files, and my discharge, the one they said they had, had disappeared some place. [33]

Q. When was that with relation to the time you worked on the Goucher Victory?

A. That was way after I worked on the Goucher Victory.

Q. Was that before or after you received papers in the mail as to your discharge?

A. I received papers in the mail from Mr. Thomas several months, I believe you have it there when I received it.

Q. Here is what I am getting at, you went down and asked to see your discharge papers and they couldn't find them? A. That is true.

Q. Was that before or after you received a copy of them in the mail? A. That was before.

Q. But that was after you had worked on the Goucher Victory? A. Yes.

Q. Had you at any time up to the time you quit working on the Goucher Victory been notified that you were terminated? A. No.

Q. Were you informed, and did you believe that the type of work you were doing did not go through the personnel department?

A. I didn't know whether it was or not. A night Mate [34] is different than all others.

Q. Did you inquire of the man in charge of the personnel department about this night Mate job?

A. I went to the personnel, but Miller wasn't in.

(Testimony of William P. Thornton.)

but I met him later on in front of Pier 39 and that conversation went on.

Q. That was before you took the position?

A. No. Yes, that was before I took the position. That was on about the 5th or 6th of July.

Q. Did you sign the log book on the Goucher Victory?

A. Yes, sir. If I didn't, the man that relieved me did.

Q. You signed that each time you worked?

A. Yes.

Q. And that is in the possession——

A. That was on board the ship, of course, and the log book was left on board the ship.

Mr. Garland: That is all.

Recross Examination

By Mr. Belcher:

Q. Do you have your discharge papers with you? A. No, I haven't.

Q. Where are they?

A. The duplicate. I mean, that Mr. Thomas sent, I [35] believe is here.

Q. Well, I would like to see it. Produce it, please.

Mr. Garland: If Your Honor please, may the witness come down and pick out the paper?

The Court: The witness may step down and assist counsel in locating the paper.

(Discharge marked Plaintiff's Exhibit 1 for identification.)

(Testimony of William P. Thornton.)

Mr. Belcher: All I am interested in is the one document.

Mr. Garland: I have no objection.

The Court: Have you any objection to separating the one he wishes?

Mr. Garland: No, I haven't.

The Court: Does counsel have any objection to having all papers kept together and have them all marked together?

Mr. Belcher: The War Department notification of personnel action is the only one I care for.

The Court: Does counsel for plaintiff wish the whole matter to be kept together because it is all related or for any other reason?

Mr. Garland: It is all related, but there is no prejudice in putting it in as separate exhibits, so I have no objection to counsel's wish. [36]

The Court: Will the clerk take that paper away from the others and transfer to it the clerks' marks as to the exhibit in question, being Plaintiff's Exhibit 1, and delete from the other papers those marks and return the remaining papers to counsel for plaintiff.

Q. You are being handed a paper marked for identification as Plaintiff's Exhibit 1. Did you ever see that before? A. Yes.

Q. When did you get it?

A. I would say about seven months after I was on the Goucher Victory. If I am permitted to go ahead, I came down to Mr. Thomas' office and asked

(Testimony of William P. Thornton.)

him if I could have a copy of my discharge, that I have never received one, and he said, after looking, that it had disappeared. It was gone, they couldn't find it, it wasn't in my files.

The Court: Are you repeating his words now?

The Witness: No.

The Court: It is difficult for me to tell when you are speaking his words or your own. Try to make it clear. Those words spoken by you just now were words which you say he used, or words which you in his presence used?

The Witness: I came to Mr. Thomas' office, and asked him if I could have a copy of my discharge, that I had never received one.

Q. You knew at that time that you had been discharged, didn't you?

A. I had been told I had, yes.

Q. When were you first told?

The Court: Do you mean with reference to his alleged work period on the Goucher Victory?

Mr. Belcher: Yes.

Q. When were you first told that you were discharged for disability?

A. I was told something, but never had received—

The Court: He wants to know when you were told something.

Q. Would it be May 29, 1947?

A. I can't say that, no.

(Testimony of William P. Thornton.)

The Court: Can you say approximately when it was?

The Witness: When I received——

The Court: The notification, the information that you had been discharged. When did you first hear about it from anybody?

The Witness: There is something in there——

The Court: Will you let him have “something in there”?

Mr. Garland: Will you come down, please, and pick [38] it out?

The Court: Now, can you answer the question after seeing that paper? Read the question.

(Last question read by reporter.)

The Witness: No, it wouldn't be May 29th.

Q. Do you remember having gone to the doctor's office? A. Yes.

Q. Do you remember what date that was?

A. No, I don't.

Q. Would you say it wasn't May 29, 1947?

A. I wouldn't say for certain what day.

Q. What did you go there for?

A. With an envelope from Mr. Miller.

Q. Were you not told your purpose of going to see the doctor?

A. He told me that there was my discharge papers, yes.

Q. And that was on the 29th of May?

A. I couldn't say it was on the 29th. I think it was around the 12th or 13th.

(Testimony of William P. Thornton.)

Q. That was before you went to work on the Goucher Victory, wasn't it?

A. Yes, May 29th would be before I went to work.

Q. And the reason you went to the doctor's office was because you were not satisfied with the form of discharge you had received?

A. That is not true.

Q. Did you not yourself raise the question of having a discharge for disability rather than termination, ordinary termination? A. No.

Q. Who raised the question?

A. About being discharged for disability?

Q. Yes.

A. I was told by Mr. Miller and Mr. Andahl that I was going to be terminated.

Q. When was that? A. Well——

Q. In the month of April, wasn't it?

A. Some time in there, yes.

Q. Then you were terminated, weren't you?

A. I don't know. I don't know until later until this come—after going to Mr. Thomas to find out.

Q. Did you not yourself raise the question of the type of discharge you received? A. No.

Q. You did not?

A. I did raise about this piece of paper here.

Q. I am not concerned about that. [40]

A. I would like to have you read it.

The Court: I did not hear your last remark.

The Witness: I did complain about this.

(Testimony of William P. Thornton.)

The Court: Did you refer to Mr. Belcher in that statement, "I would like to have you read it?"

The Witness: Anybody, yes. This is the only one I could say.

Q. When was your arm injured?

A. You mean, when I went in to that doctor?

Q. The occasion when you went to the Marine Hospital.

A. I would say about the 20th of December.

Q. Of what year? A. 1947.

Q. Had you not had any—

Mr. Garland: If your Honor please, I believe the witness is mixed up as to years.

The Witness: What is that?

Mr. Garland: I believe you are mixed up as to your years.

The Court: I will try to have in mind that possibility, but you may bring that out.

Q. Can you explain why you did get a discharge for disability if you had not had any injury prior to the date of your discharge?

A. Ask that again. [41]

The Court: Read the question.

(Last question read by reporter.)

The Witness: This is getting me—there are so many angles I am getting at, I don't know how to answer them.

The Court: Read the question again.

(Last question read by reporter.)

The Witness: No.

(Testimony of William P. Thornton.)

The Court: I think this is produced by the witness misstating the year. That seems obvious, and why don't you act accordingly.

Mr. Belcher: Pardon me, Your Honor.

Q. Was it in December, 1946 that you got the arm injury?

A. That is when I had the injury. You mean when I struck the door of the ship?

Q. Whatever injury it was that you were finally discharged on account of disability.

A. If that is what it was, I think it was 1946.

Q. After you were first informed that you were going to be terminated, what was said to you?

A. What?

Q. What was said to you?

A. Did you say, "What does that do"?

Q. What was said to you? [42]

A. This was sent to me here.

Q. I understood you to say that you knew sometime in April, that somebody told you that you were going to be terminated?

A. 21 April, that is what it says right here, from John Miller.

Q. Did you not at that time make inquiry as to the type of discharge you were to get?

A. I said, "Well, what is the hurry about discharging me? I have leave time coming. Why not wait a little while?" I understood at that time that if you were in the service five years that you would have retirement pay coming in, so I told them, Mil-

(Testimony of William P. Thornton.)

ler and Emdahl both were there, and they said, "We'll let you stay until your five years is up."

Q. When would that be?

A. I went to work on May, 1942 and that would be May, 1949.

Q. 1947? A. 1947, I mean.

Q. And that was nearly two months before you went to work on the Goucher Victory, wasn't it?

A. Well, I went to work on the 10th of July.

Mr. Belcher: No further questions.

The Court: You may be excused.

(Witness excused.) [43]

The Court: Call the plaintiff's next witness.

Mr. Garland: We rest, Your Honor.

The Court: Does anyone offer this discharge?

Mr. Garland: I intended to offer it, yes Your Honor.

Mr. Belcher: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 1 received in evidence.)

Mr. Garland: If it is going to be admitted, I would like to put the witness back on the stand and identify the other papers with this exhibit.

The Court: That may be done, but you could have kept them together originally.

Mr. Garland: I thought it would save time.

(4-13-48 Letter marked Plaintiff's Exhibit 2 for identification.)

The Court: The Court will disregard the statement of counsel that plaintiff rests.

Mr. Belcher: No objection. [44]

WILLIAM P. THORNTON

Redirect Examination

(Continued)

By Mr. Garland:

Q. Showing you Plaintiff's Exhibit 2, was that a letter that you received the same time you received your discharge? A. No.

The Court: Is that the letter you received at the same time you received your discharge?

The Witness: Yes.

Mr. Garland: I offer Exhibit 2.

Mr. Belcher: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 2 received in evidence.)

(Application for Refund marked Defendant's Exhibit A-1.)

Recross-Examination

By Mr. Belcher:

Q. You are being handed a paper marked for identification as Defendant's Exhibit A-1. Do you see your signature on that? [45]

A. Yes, sir.

Q. That was filled out in full before you signed it, wasn't it?

A. This was filled out in full, just my signature, yes.

Mr. Belcher: I offer that in evidence.

Mr. Garland: No objection.

(Testimony of William P. Thornton.)

The Court: Admitted.

(Defendant's Exhibit A-1 received in evidence.)

Mr. Belcher: Nothing further.

Mr. Garland: Nothing further.

The Court: You may step down.

(Witness excused.)

Mr. Garland: Plaintiff rests.

The Court: Those connected with this case are excused until 2:00 o'clock this afternoon and may now retire. Court will be in recess until 2:00 o'clock this afternoon.

(At 12:00 o'clock p.m., Wednesday, June 22, 1949, proceedings recessed until 2:00 o'clock p.m., Wednesday, June 22, 1949.) [46]

June 22, 1949—2:00 o'Clock P.M.

The Court: In the case on trial, the defendant may now proceed.

Mr. Belcher: For the preservation of the record, if Your Honor please, we renew our motion to dismiss at this time for the reason and upon the ground that the testimony of the plaintiff himself clearly shows that he comes within the provisions of the exception under the Tucker Act, that he was an officer of the United States, and therefore our motion should be granted.

The Court: I feel more inclined to the course of reserving final ruling on this motion now than I did when it was made before. I have considered some

of these authorities and if counsel requests, the Court at the close of all the evidence will give further consideration to the matter. I will wish all the light that you can throw upon the question of whether or not this sort of an employee is within the meaning of the law an officer of the United States.

You may proceed. [47]

ROSCOE G. THOMAS

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Roscoe G. Thomas.

Q. You are a little hard of hearing?

A. A little bit.

The Court: Is he as hard of hearing as the other witness was?

Mr. Belcher: Not quite, but nearly.

The Witness: I believe, Your Honor, I can hear them all right.

Q. What is your occupation?

A. I am employed now as an employee relations assistant at the Seattle Port of Embarkation.

Q. And in July, 1947, what was your capacity?

A. At that time, I was the Chief of the Marine Crewing Section, which is the employment

(Testimony of Roscoe G. Thomas.)

office for Marine personnel at the Seattle Port of Embarkation.

Q. As such, I will ask you whether or not you were [48] the custodian of records of that department? A. Yes, sir.

Q. Do you know a John W. Miller?

A. Yes, sir.

Q. At that time; what was his occupation?

A. He was my assistant in charge of employing men in the deck department, especially, I believe.

Q. Will you explain to the Court the method of operation under the rules and regulations that have been established as to how employment is obtained through that section?

A. In order to obtain employment aboard the ships at the Seattle Port of Embarkation, it is necessary to submit an application and have a physical examination, be checked by the Intelligence and Security Division, and have fingerprints taken and fill out papers pertaining to income tax, and I believe there is some others which I have left out. There is a very lengthy routine a person has to go through to be employed.

Q. Each employee has a file that you call what?

A. We call it either the 201 or personnel file. One thing I omitted, a person has to take the oath of office and sign an anti-strike affidavit when he is employed.

Q. That is applicable to employees aboard ships, those vessels that were assigned to the Army?

(Testimony of Roscoe G. Thomas.)

A. Yes, sir.

Q. Do you have the 201 file covering the plaintiff in this case? A. Yes, sir.

Q. Do you have it with you?

A. I believe it is on that desk, sir. There are two of them there. One is his payroll file and one is his 201 file.

Q. For the purpose of refreshing your recollection, you may examine this file, which I understand was kept by you, under your supervision?

A. Yes.

Q. With reference to the employment record of the plaintiff in this case? A. Yes, sir.

Q. The employment record of Captain Thornton, William P. Thornton? A. Yes, sir.

Q. When was he first employed?

A. Well, it was in 1942.

Q. What time in 1942?

A. I believe it was the 8th of May, 1942.

Q. Does that show where he was employed?

A. Yes, sir. He was employed as First Mate, Transportation Corps, Seattle Port of Embarkation, Seattle, Washington, Army Transport Service, United States harbor boat, Pacific Monarch.

Q. When, if at all, was he discharged from that ship? A. On the 17th of June, 1942.

Q. What was his next employment?

A. June 23, 1942, employed as Third Officer, Quartermaster Corps, Ninth C. A., San Francisco,

(Testimony of Roscoe G. Thomas.)

California, Army Transport Service, Seattle, Washington, Vessel Manning Cadre.

Q. Is that commonly known as VMC?

A. Yes, sir, VMC.

Q. When was his next employment?

A. On July 7th, 1942, he was transferred and had a change of status to Master of the U.S.A.T. Funston.

Q. When was that terminated?

A. That was terminated by his transfer 8 September, 1942, to Master of the U.S.A.T. O'Hara.

Q. Then what was the next employment?

A. He was transferred and had a change of status in 29 December, 1942. I have left out one, sir. On September 5, 1942, he was transferred to First Officer on the Vessel Manning Cadre. Then the next one was the one I started to read. He was transferred to Third Officer on the Silverado, 29 December, 1942. [51]

Q. And after that?

A. 13 April, 1943, he was transferred as First Officer on the Vessel Manning Cadre.

Q. And that was on the same ship?

A. I beg your pardon?

Q. That was the same ship that he had been on?

A. No, he came from the Vessel Manning Cadre to the Silverado.

Q. Then the next one?

A. From there he went to Associate Marine Superintendent, CAF 11, 17 April, 1943.

(Testimony of Roscoe G. Thomas.)

Q. Then the next one?

A. The next one was to the training ship Sierra, 15 June, 1943, in the same capacity, but a different assignment.

Q. What is the next one?

A. The next was to Pilot of the Sierra, 16 June, 1943.

Q. What was the next?

A. Next is 1 October, 1943, First Officer at Large, Vessel Manning Cadre, Deck Department.

Q. What was the next?

A. That was part of the Water Division.

Q. And the next one?

A. The next one was a corrected action, corrected that one I just read, changing the date to 4 October, 1943. [52] On 4 October, 1943, he was transferred from Pilot on the Sierra to First Officer at Large in the Water Division, Safety and General Service Branch, Vessel Manning Cadre, Deck Department, sub-section.

Q. What was the next?

A. The next is 1 February, 1944. He was transferred to Master of the U.S.A.T. Teapa.

Q. And the next one?

A. The next is 16 February, 1944—I beg your pardon, that is a duplication. 1 February, 1945, transferred to Second Officer of the U.S.A.T. Hoyle.

Q. What was the next one?

(Testimony of Roscoe G. Thomas.)

A. 13 April, 1945. That is a duplication, too. 29 June, 1945, is the next change.

Q. Wasn't he made Master of the Hoyle on April 13, 1945?

A. On April 13, 1945, there was a reassignment action, changing him from Second Mate, salary \$2818 per annum, to Second Mate, to serve as Ship's Master at the same salary, \$2818.

Q. What was the next one?

A. The next, 29 June, 1945, when he was transferred and promoted to Master of U.S.A.T. Sierra.

Q. And following that?

A. 24 July, 1945, he was transferred and promoted to [53] Master of the U.S.A. vessel FS 31.

Q. Following that?

A. There seems to be one document left out here, because the next personnel action shows him being transferred from the Q 137, Chief Officer, to serve as a Master to the J 2139, Chief Officer.

Q. What date was that?

A. That is the 4th of November, 1946.

Q. Then what followed?

A. The next one is dated 7 December, 1946, transferred from the J 2139 to the J 299.

Q. Then what followed?

A. The next is the transfer January 22, 1947, from the J 299 to the T 45.

Q. Anything further?

A. There is a separation action for disability effective 15 April, 1947. At the time he was sepa-

(Testimony of Roscoe G. Thomas.)

rated, he was serving as Master of the T 45. Would you like me to read the remarks on that?

Q. No. Tell us in each one of these transfers, from one ship to another, did he have to deal through the personnel office? A. Yes, sir.

Q. What did he have to do?

A. As a matter of fact, as I remember it, he worked [54] in a personnel office for a short time. At one time the Water Division had a branch of their division in the same room where the personnel office was. We worked very closely together, as I remember it. He was working at one of those desks where men were appointed and transferred and promoted, and so forth and so on. In order to effect all of these actions that I read here, every time Mr. Thornton was transferred or promoted or changed from one ship to another, he reported to our office where the papers were made out and the appointment was made.

Q. Of your own personal knowledge, do you know whether or not Captain Thornton was familiar, thoroughly familiar, with the rules and regulations with respect to changes of position and original employment and discharge?

A. I can only say that I should think he would have been thoroughly familiar with it.

Q. Is anybody ever employed by the Army or by your Marine Crewing Section without passing through personnel?

A. Only in dire emergencies, when ships are overseas and it is necessary to put on an essential

(Testimony of Roscoe G. Thomas.)

crew member, somebody has gotten sick or something overseas, at out-ports occasionally, never in Seattle.

Q. You spoke of his being separated from the service? A. Yes, sir.

Q. What date was that? [55]

A. 9 May, 1947.

Q. What date was that effective?

A. That was the effective date. This document was prepared on the 28th of May, 1948.

Q. Tell the Court something about the preparation of that document you are just speaking of. A notice of separation, is it?

A. This document is the notification of personnel action. The date of the document is 28 May, 1948. It is addressed to William P. Thornton through the Superintendent of the Water Division, Seattle Port of Embarkation, nature of action, separation disability, effective date 9 May, 1947.

Q. How many copies of that are made?

A. I believe five copies are made.

Q. What becomes of them?

A. The original goes to the individual concerned, and then there are other copies for the payroll file, 201 file, the Civil Service. That is about five, I believe.

Q. In this instance, what date was Captain Thornton notified of his separation from the service.

(Testimony of Roscoe G. Thomas.)

A. As to this particular document in Captain Thornton's case, I couldn't say, but I can only say that the practice is to mail these out practically immediately after they are made.

The Court: Court is recessed five minutes. [56]

(Recess.)

Q. Before the recess, you examined the 201 file of Captain Thornton and you testified concerning the separation from service. I think you gave the date of May 28. Have you got your file with you?

A. No, sir, it isn't here now.

Q. Where is it?

A. I left it here, sir.

Q. What did you do with it?

A. I left it here.

Q. Is that the file you had before?

A. Yes, sir.

Q. Now, will you look at your file again? Do you understand the question?

A. Yes, sir.

Q. You testified that the date of separation was 28 May, 1947?

A. That was the date of the corrected separation.

Q. What was the date of separation?

A. The original separation document was prepared on the 15th of May, 1947, effective 15 April, 1947. That was subsequently corrected on the 28th of May, 1948, to show the effective date of separation as 9 May, 1947.

(Testimony of Roscoe G. Thomas.)

Q. You wrote a letter dated April 13, 1948, Plaintiff's Exhibit 2. Will you examine that, please? A. Yes, sir. [57]

Q. Does that refresh your recollection of the separation of Thornton from the service?

A. I don't quite get the question.

Q. In that letter do you not say, in effect, that a notice of separation was mailed about a year ago? A. Yes, sir, that is right.

Q. What is the date of the letter?

A. The date of the letter is 13 April, 1948.

Q. So that when you spoke of a year ago, you meant April, 1947? A. Yes.

Q. And is this Exhibit No. 1 which has been introduced in evidence a copy of what you refer to in your letter?

A. Yes, this is a copy of the personnel action which was prepared on 15 May, 1947, showing separation for disability.

Q. When was the copy prepared? That is not a duplicate original or anything of that kind, is it?

A. No, the original—I don't know. I did not actually mail the original myself, so I can't swear that the original was mailed.

Q. You said in that letter on the 13th that it was mailed a year ago?

A. That was the assumption, that it was mailed, because it is certainly always the practice to mail out [58] employees' copies of all personnel actions.

(Testimony of Roscoe G. Thomas.)

Q. Do you know where it was mailed to?

A. Where it was mailed to?

Q. Yes.

A. It was mailed to the same address, 935 Summit Avenue North, Bremerton, Washington, but I didn't type the letter so I can't—

Q. Let's not be technical. I am trying to get the information for the Court as to what transpired.

A. I am sure that this separation action, the original of it, was mailed to Captain Thornton, but I can't swear to that because I didn't actually do it myself.

Q. Did you have anything to do with the application that was filed by Captain Thornton for refund of retirement deductions?

A. Not directly, sir.

Q. Have you any such thing in his 201 file?

A. There was a copy of the retirement application. I believe that that has been taken out.

Q. Is that the one I took out of his file?

A. Yes.

Q. It is marked Defendant's Exhibit A-1. It constitutes part of his file, does it not?

A. Yes, sir.

Q. What is shown as the date of separation there? [59]

A. The ending date is the 15th of April. It is not very well typed here, sir. As a matter of fact, I can't read the year. It is the 15th of April.

Q. Do you know the year?

(Testimony of Roscoe G. Thomas.)

A. Yes, it was 1947.

Q. That is signed by Mr. Thornton, himself, is it not? A. Yes.

Q. And in making application to the pension board for refund of the retirement that he had paid in, he himself stated, did he not, that the date of separation was April 15, 1947?

A. Yes.

Mr. Belcher: You may examine.

Cross-Examination

By Mr. Garland:

Q. Was it necessary every time that Captain Thornton changed from one position to another that he again take his oath and again be fingerprinted and go through the same process each time he was changed from one ship to another?

A. No, sir.

Q. All these transfers and changes and so forth only required the one processing, isn't that right?

A. The transfer required the preparation of personnel [60] action.

Q. But as far as the employee himself is concerned, he goes through no more physical tests or any type of procedure other than would be noted by these transfers, isn't that right?

A. That is right.

Q. You spoke of the fact that he had to be fingerprinted and he had to take a non-strike oath and a few other things. That is the same oath that

(Testimony of Roscoe G. Thomas.)

is given to an ordinary and an able-bodied seaman that you hire, isn't that right?

A. Yes, sir.

Q. Was the process any different in hiring Captain Thornton, in so far as hiring personnel is concerned in your department than it would have been in hiring any seaman?

A. Not except that higher qualifications are required.

Q. In what way?

A. Qualifications such as licenses and so forth and so on, ability.

Q. If he was to be a Mate, a Master or First Officer, he was to have the necessary papers as provided by the different government bureaus to hold that position? A. That's right.

Q. What papers would a person need to hold the position of night Mate?

A. I believe at that time, he was required to have [61] Third Mate's papers.

Q. You did hire people at that time without any Mate's papers or even seaman's papers to act as night Mate, didn't you?

A. I couldn't say as to that.

Q. You have at times so hired people, have you not? A. I don't know.

Q. Was it customary in sending a notice of termination to a person who has terminated to also send along a letter of transmittal of some kind?

A. No, sir.

(Testimony of Roscoe G. Thomas.)

Q. Was there any record of mailing that went out of the office, to whom they went?

A. No, sir. The form is addressed to him and is put in an envelope and mailed.

Q. There is no office check on that except it is the custom of the business to do that?

A. That's right.

Q. Has there ever been any time that employees have been hired by the Marine Superintendent's Office? A. Not that I know of.

Q. Does that office have that power to hire employees? A. No.

Q. Were the night Mates processed the same as all other persons, so far as you know, who secured their positions? [62] A. Yes, sir.

The Court: What are the duties of night Mate? Is it anything like watchman on board a ship?

The Witness: A night Mate has more responsibility than a watchman. He is the relief officer of the ship and there are times when there is no other officer on the ship. At that time, he is in charge of the ship.

Q. Correct me if I am wrong. As I understand it, the regular day would work its eight hour shift, then they would all go home and leave somebody in charge of the ship and that would be the night Mate, is that right?

A. Not necessarily, it could be that way.

Q. Is that why the night Mate position was originated, so the other officers could be relieved?

(Testimony of Roscoe G. Thomas.)

A. So the other officers could be relieved, yes, sir.

Q. It was never contemplated that the night Mate would take command of the ship and run it out to sea or anything of that nature?

A. No, sir.

Q. And he had no charge of the loading and unloading of a ship or any say as to the ship's personnel or anything of that nature?

A. Some of these technical questions about night Mates I am not too familiar with. We have some other people you are going to call here, I believe, who can answer those [63] questions better than I can.

Q. I believe you got your years mixed up, but at one time in your testimony you stated there was a correction of discharge papers on the 28th day of May, 1948. Did you mean the 28th of May, 1947? Or was there something that took place on the discharge in May, 1948?

A. The date of the corrected action is the date that it was prepared, 28 May, 1948, that is a correction. This instrument, WD 50, that is the name of the personnel action.

Q. What was the nature of the error in the first action?

A. That is what I was going to read. This instrument, WD 50, dated 15 May, 1947, which showed the effective date 15 April, 1947 COB—close of business, that means—correction of ini-

(Testimony of Roscoe G. Thomas.)

tial separation necessary due to administrative error in fixing the effective date of separation.

Q. What department of the government is your personnel office under?

A. The Department of the Army.

Q. Is that in turn under the Secretary of War?

A. He was formerly called Secretary of War.

Q. At this time, was he called Secretary of War in 1947? A. I believe he was, yes.

Q. Do you know the mechanics by which that authority [64] of his was finally transmitted until it hired the stevedores who unloaded the ships? How was that worked?

A. I think we have some reference books here that would give that exactly, but I will try to——

Q. Are you familiar with it yourself?

A. I am familiar with it, yes, sir.

Q. Go ahead and explain what you actually know?

A. The Constitution of the United States delegates certain appointing authority to the President for hiring employees of the government and the President in turn delegates those powers to the different departments and the departments in turn delegate authority on down through the chain of command to the appointing officers in installations.

Q. You finally get down, I suppose, to the bottom where some stevedore has to unload the ship, is that right? He would be about the last one on the list?

(Testimony of Roscoe G. Thomas.)

A. The appointing officer—in cases we are talking about, Marine personnel, there is one appointing officer for all Marine personnel whether they are stevedores or captains of ships.

Q. Is his appointment signed by that officer?

A. Yes, sir.

Q. And you have the appointment of Captain Thornton there originally in his record? [65]

A. I imagine he has the original of it. There is a copy of the original appointment here signed by Wes L. Verd, Captain, Transportation Corps, Assistant Executive Officer, ATS, October, '42.

Q. Assistant what?

A. Assistant Executive Officer, ATS.

Q. Did it say what he is the executive officer of?

A. ATS, Army Transport Service.

Q. Is there anything there that shows it is a part of the regular Army or how its authority comes out of the Army?

A. Well, there is nothing in here that shows that.

Mr. Garland: With the Court's permission, perhaps if I explain what I am after, he can be able to answer me. For the purpose of this case, a person is or is not an officer, depending on two things: (1) the duty that he does, and (2) the line of his appointment. If his authority comes direct from the President, from the cabinet officer, he would be an officer for this purpose. A stevedore, I don't think, could possibly be an officer. I don't believe

(Testimony of Roscoe G. Thomas.)

a deck hand could, but on the other hand, we couldn't help but call an ambassador an officer.

Mr. Belcher: Is counsel arguing the case now, if Your Honor please?

Mr. Garland: I am just trying to [66] get an answer. If I am going too far, I would be glad to be stopped, but I am trying to get the point over to this man so I can get the mechanics.

The Court: I believe you should find out if the witness knows and then turn to some other witness if he does not.

Q. Do you know yourself how the authority is delegated to the Captain Verd who signed the appointment?

Mr. Belcher: My next witness is going to detail all of that, if Your Honor please.

Mr. Garland: I shall withdraw the question. That is all.

Mr. Belcher: I think the Court will take judicial notice of the fact that the Secretary of War is a cabinet officer who is appointed by the President.

Mr. Garland: Yes.

The Court: Both sides feeling that the Court should, I announce to you that the Court will.

The witness may be excused.

(Witness excused.)

- RALPH JAY

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows: [67]

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Ralph Jay.

Q. Where do you live?

A. 2922 Alki Avenue, Seattle, Washington.

Q. What is your occupation?

A. Deputy Chief of civilian personnel for the Seattle Port of Embarkation, Seattle, Washington.

Q. And have been for how long a period of time?

A. Approximately February 1st, 1948.

Q. In 1947, what was your occupation?

A. I was Certifying Officer for the Seattle Port of Embarkation.

Q. As such, state whether or not it was your duty to certify Army payrolls?

A. Yes, sir, for all civilian employees, not the military.

(Time sheet marked Defendant's Exhibit A-2 for identification.)

Mr. Belcher: I ask the Court that I might withdraw the original and furnish certified copies of the payroll in this particular instance.

The Court: If the certified copy is a [68] photostat, that request will be granted upon condition that a white background photostat be furnished. Sometimes the Army particularly wants to furnish a

(Testimony of Ralph Jay.)

black background photostat and that will not be accepted by the Court as a substitute.

Q. In 1947, you say you were the certifying officer? A. Yes, sir.

The Court: In that connection, what is it you usually certified?

The Witness: Certified to the correctness of payrolls and payments made to civilian employees, purely salary and wages, no purchases of material.

Q. Mr. Jay, you have been handed some papers marked for identification as Defendant's Exhibit A-2?

A. I have A-2 only, sir.

Q. Can you state what they are?

A. This is the time sheet for night Mate and/or night engineer, Seattle Port of Embarkation. It is a certified true copy, I should say.

(Informal buck slip marked Defendant's Exhibit A-3 for identification.)

Q. Exhibit A-3, did you ever see that before?

A. I have, yes, sir.

Q. As the certifying officer, did you or did you not [69] certify those payrolls?

A. Covering these time sheets?

Q. Yes. A. I did not.

Q. You did not? A. No, sir.

Q. Why?

A. It would constitute an illegal payment.

Mr. Garland: I object to the answer as a con-

(Testimony of Ralph Jay.)

clusion of the witness. That is what this lawsuit is about.

Q. That was your reason for refusal?

The Court: He can state what his reasons were for not certifying, and you can inquire about the facts concerning his action in connection with that detail. The Court overrules the objection.

Q. How long have you been in government service? A. February 1st, 1944.

Q. Who is the cabinet officer in charge of the Army operations at the Port of Embarkation?

A. At this time, the Secretary of the Army.

Mr. Garland: I object to that. This witness is not qualified to answer questions concerning—

Mr. Belcher: I asked for the cabinet officer.

Mr. Garland: I still believe this is [70] not the correct way to prove who was a cabinet officer.

Q. The Secretary of War, was it?

A. At this time, it is the Secretary of the Army.

Q. I am talking about 1947?

A. The Secretary of War at that time, yes, sir.

The Court: The objection is overruled.

Q. Do you know anything about the delegation of authority by the Secretary of War, gleaned from any instructions or orders or Statutes or anything of that kind? A. To make appointments?

Q. Yes.

A. The original delegation, or the one in effect, was Order C, of 1946.

Q. Order C of June 6, 1946?

(Testimony of Ralph Jay.)

A. Yes, sir, and amended.

Q. Who was that order issued by?

A. Secretary of War. That was later amended by Order E, I believe, August of 1946.

Q. By whom was that signed?

A. The Secretary of War.

Q. To whom was the authority delegated?

Mr. Garland: I think the delegation would speak for itself and would be the best evidence.

Mr. Belcher: I do not have them here, Your Honor. I did not anticipate that. [71]

Q. How long would it take you to furnish those?

A. We can probably have them this evening. We could tomorrow.

The Court: The objection is sustained.

Q. Do you know generally how that authority is delegated?

Mr. Garland: Same objection.

The Court: That is sustained. You can ask him if he did anything pursuant to that authority, in execution thereof, himself, and you can ask him what he did.

Q. Will you have them with you tomorrow morning? A. Yes, sir.

Q. A white background certified copy of Order C of June 6, 1946, and Order E of August 2, 1946?

A. Yes, sir.

Mr. Belcher: That is the extent of our evidence for the purpose of showing that this man is an officer of the United States.

(Testimony of Ralph Jay.)

The Court: That is the plaintiff in this case?

Mr. Belcher: Yes, Your Honor. With the exception of the introduction of those two documents, the rest is covered by the law.

The Court: Do you wish to cross-examine as far as this witness has gone now? [72]

Mr. Garland: No. I will go further and stipulate that any certified copies of such orders may be introduced without further identification. We would like to move this to the Court and not have the witnesses come back.

Q. Will you also produce tomorrow morning a photostatic copy of the same type of circular, 25-35-16, dated November 7, 1947?

A. Yes, sir. Would it necessarily have to be a photostat? Can't we submit an original?

Q. The trouble is, we can't put your original in if it is your original record.

A. We may have available copies for the Court.

The Court: He was trying to explain that he might have a copy that was made otherwise than by a photostating machine.

Mr. Belcher: If that is satisfactory to the Court.

The Court: It is only where photostats are used that I made my remark previously.

Q. Instead of photostatic copies of these two other circulars and this third one you spoke of, will you have them certified as true copies?

A. These will be the action copies, the same as are furnished by the Secretary of War, the same as they are distributed.

(Testimony of Ralph Jay.)

The Court: I think counsel was [73] asking you to exercise caution to see that by proper authority there is a certification that the document you present is certified by proper authority to be a true and correct copy. I think counsel wanted to be sure it would not be subject to the objection that the copy is an unauthenticated copy that may or may not be official. I believe that is the caution counsel was asking you to apply.

Mr. Belcher: That is all.

The Court: You may examine.

Cross-Examination

By Mr. Garland:

Q. The Order C of 1946 and Order E of 1946 which came from the Secretary of War's office, which you have testified you will enter here tomorrow, are they the same orders that apply to the hiring of a seaman as to the hiring of Captain Thornton?

A. It is the delegation of authority from the office of the Secretary of War through the chain of command to the commander of the installation. In our particular case, it would be——

Q. It would be the same authority that allows you to hire your janitor as allows you to hire your sea captains?

A. To make appointments, to perform the duties of the [74] installation.

Q. Does that make your answer yes?

A. Will you repeat the question? I tried to

(Testimony of Ralph Jay.)

make it clear. The reason I qualified it is because Order C would apply to an inland installation where there would be no shipside employees. They give authority to the installation commander to make appointments and to delegate his authority.

Q. Are there any other orders that delegate any authority to the head of the department?

A. Not that I recall.

Q. So he hires his janitors under that same authority, as well as hiring sea captains under that authority? A. That is right.

Q. A sea captain is in common parlance called a civilian employee? A. Yes, sir.

Mr. Garland: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Belcher: The defendant rests.

The Court: Do you have any rebuttal with which you can go forward at this time?

Mr. Garland: I would like to ask counsel for the United States if they have the [75] ship's log here. I subpoenaed it, and I would like to get the Goucher Victory's log in to show he worked those times.

Mr. Belcher: There isn't any dispute about that. We have offered the payrolls to show it.

Mr. Garland: No further evidence.

Mr. Belcher: I want to offer the last two exhibits, A-2 and A-3.

Mr. Garland: I object to A-3 unless there is

stricken from A-3 that portion which says it is void, which would be a conclusion, could not be testified to, and could not come in a written instrument. It is self-serving, and that portion of it which says it is void should be stricken.

The Court: When was the objected to statement entered on the document? Has it been proved as to how it got on there?

Mr. Belcher: Yes. The witness testified he voided it as certifying officer.

The Court: Did he do it at the time in question when the work was done?

Mr. Belcher: That is my understanding. [76]

RALPH JAY

Redirect Examination (Continued)

By Mr. Belcher:

Q. When did you put the word "void" on it?

A. At the time the time sheet was presented to the payroll office.

The Court: Approximately when was it with reference to the alleged doing by the plaintiff of the work for which he sues here?

The Witness: The work was performed, beginning 10 July through 31 July. They were the two time sheets which I voided. That was early in August, I would say the first few days of August, the first week. I can't remember exactly.

(Testimony of Ralph Jay.)

Q. At that time, they were submitted to you for certification?

A. Yes, sir. At the time they were submitted to me for payment, I voided them because the man had not been appointed.

Mr. Garland: If it is after the work was done, it is still self-serving as far as the government was concerned.

The Court: If it was part of his duty—do you admit he did it as part of this witness's [77] duty in connection with the payroll?

Mr. Garland: If he will so testify. I believe that is his testimony.

Q. Did you do that in performance of your usual duties as certifying officer? A. I did.

Q. And at the time the payrolls were submitted to you?

A. Immediately upon presentation to me.

The Court: The objection is overruled. Defendant's Exhibit A-2 and A-3 are admitted.

(Defendant's Exhibits A-2 and A-3 received in evidence.)

(Witness excused.)

Mr. Belcher: I just want to explain this so that there won't be any misunderstanding. Our motion to dismiss is based upon the fact that this suit was brought under the Tucker Act which distinctly provides that this Court is without jurisdiction of suits of a civil nature for salaries, wages, and commis-

sions, I think is the way it reads, of officers of the United States.

It looks rather inconsistent, perhaps, to show that the payrolls were voided and at the same [78] time claim that he was an officer of the United States, but that proof is offered merely for the purpose of showing why the demand which they plead was refused. I don't want to get this too confused. It is not an inconsistent position, as I see it, and for that reason I am not offering any evidence at all to show the things leading up to the employment or the alleged employment. The man worked, there is no question about that.

The Court: I understood there was to be some more evidence received here tomorrow.

Mr. Belcher: There will not be any further evidence unless counsel wants him back for cross-examination. I understood he waived that.

Mr. Garland: I waived the right to cross-examine.

The Court: What is the use of presenting evidence unless the Court is to consider it? I do not wish to make any ruling in the case until all the evidence is in.

Mr. Belcher: As I said, the purpose of that evidence is merely for the purpose of showing to Your Honor that this man is as we claim, if he was properly hired, an officer of the United States, and that this Court has no jurisdiction over this proceeding.

The Court: I will state in addition [79] that if the Court can be aided in determining this question

by that further evidence, the Court is not going to determine this question until the Court has the benefit of that further evidence. It may be that in your opinion that remark of the Court is not responsive. I do not see any such evidence before the Court yet as that which you claim is manifested in this further written data that you expect to present to the Court tomorrow.

Mr. Belcher: It comes then to a pure question of law, and the case turns upon the question as to whether or not this man is an officer of the United States.

The Court: The Court will have further hearings in this case tomorrow morning, and in the meantime, I ask all of you to consider whether or not this case is different from others, that where one may mistake his legal basis, but if his facts are the same and if the facts entitle him to any relief, whether he claims under the right law or not, is entitled to as much relief as if he had not said anything about the wrong law? The thing which the Court would be concerned with here is whether or not he is entitled on the facts proved to any relief under any law, whether he declared under the right law or not, unless he waives all rights [80] accruing to him under any and all laws except the one he has declared on. I ask you to consider all of those things as well as the point you make.

Mr. Belcher: I don't believe that is a matter of defense. Our motion is directed strictly to the jurisdictional question. It has embarrassed me con-

siderably to be forced to offer evidence here if the Court eventually determines that it does not have jurisdiction. The sole question in my mind is as to whether this Court is going to follow the Supreme Court of the United States and the Fifth Circuit and the Ninth Circuit in determining that the district courts do not have jurisdiction of suits of this type.

It leaves me in the position, Your Honor, where I can't in one breath claim this man is an officer of the United States for the purpose of this motion and then come in and show that he is not entitled to be paid because he was not properly appointed.

The Court: I will say this to both sides, and you may consider it until tomorrow morning. In this case, like any other, if there is any way under the law, any law by which this man can be paid for honest work done, the Court would certainly try to find some way of doing it if it is within the issues and within the proof. I do not mind saying that to you. Every man is [81] worthy of his hire and if there is any law, whether stated in the complaint or not, which would warrant on the facts proved here, the granting to this plaintiff of any relief, the Court would be rather inclined to grant such relief.

Mr. Belcher: It seems to me that is a question for the plaintiff and not the defendant.

The Court: I am making my remarks to both sides in the lawsuit. I am not confining my remarks to the defendant. I am addressing my remarks for the consideration of both sides, to the plaintiff for

whatever it is worth and to the defendant for whatever thought the defendant may wish to give to it with a view, if the Court feels that the point should not be well taken, to be better prepared to meet it by reason of the fact that you are being advised at this time and this far ahead of the final submission of the case, so that you can consider whatever answer there may be to the suggestion of the Court.

Mr. Belcher: In view of Your Honor's ruling, I think perhaps we had better put on other testimony.

The Court: I am not making a ruling. I am making a statement as to trends of thought, tentative thinking. I am not making a ruling. I am advising both sides we have certain proof here. The question is whether or [82] not this man is to go hence without any relief upon these facts merely because he may have declared under the wrong law. Can he not bring to his assistance on the facts proved whatever law those facts would entitle him to recover on, if there is any such law? If there is any such law, I would like to have it cited to me tomorrow morning. Other people on board Army Transport ships get paid for their services. Why may not one of the officer personnel get paid?

Mr. Belcher: That brings us to the question I just mentioned, if Your Honor please, in order to meet that situation I am going to have to put on testimony.

The Court: The AB's and the ordinary seamen and black gang, I suppose, other than the chief en-

gineer, get their pay on Army transports, whether they have the right to do so under the Tucker Act or not. There is probably some law by which they are entitled to obtain relief and payment for their services like other people. I do not know, but I suspect there is.

Court is adjourned until tomorrow morning at 9:30.

(At 4:45 o'clock p.m., Wednesday, June 22, 1949, proceedings adjourned until 9:30 o'clock a.m., Thursday, June 23, 1949.) [83]

June 23, 1949, 9:30 o'clock a.m.

The Court: I think counsel should be given an opportunity first to introduce the documentary evidence mentioned yesterday. After that is done, if there are some legal questions which you would like to discuss, we can discuss any legal questions that might be involved after that.

Mr. Belcher: Very well, Your Honor. Mr. Jay has stepped up to my office and I will send somebody for him. In the meantime, if I might, I will put one other witness on to save time.

The Court: I understood all you needed to produce for those documents yesterday was certified copies.

Mr. Belcher: That is correct.

The Court: Are they certified? Let opposing counsel see them and see if he wishes to object to the lack of authentication of them. This may be regarded as part of the defendant's case and the

defendant's case-in-chief is opened up for the purpose of introducing these documents.

As I understand, there is an implication that opposing counsel is not yet satisfied with [84] the proper authentication of the documents.

Mr. Garland: We are with two of the documents. He is going to identify the third one.

(Circular re personnel marked Defendant's Exhibit A-4 for identification.)

(Delegation of Authority marked Defendant's Exhibit A-5 for identification.)

The Court: Does counsel for defendant offer A-4 and A-5 at this time?

Mr. Belcher: I do, Your Honor.

Mr. Garland: No objection.

The Court: Each of them is admitted.

Is it possible that there may be anyone else other than Mr. Jay present who might know anything about this document that needs to be further authenticated, who had a business duty to keep aware of it and be advised of it and its proper authentication and that sort of information?

Mr. Belcher: Mr. Jay was the custodian of this, if Your Honor please, and the one who received it.

The Court: What is the reason for his absence?

Mr. Belcher: I sent him to the [85] library to bring down a book.

(Orders C marked Defendant's Exhibit A-6 for identification.)

The Court: There is one practice that is becoming more general in the modern practice, and that is where counsel opposed to a proposal in the trial of a case feels aware of the fact, even if he objects strenuously to a bit of evidence, whether it is oral or in writing, that he cannot prevail in his objection, it is getting to be more and more the practice in this and other courts to withhold any objection if you think you cannot prevail in it.

In that connection, I ask counsel to consider if you can successfully resist the introduction of this document. If you feel you can, then it is proper for you to maintain your objection, but if you feel you cannot resist it successfully, why suffer the delay?

Mr. Garland: I don't want to suffer the delay. No doubt it can be identified. I would just as soon let it go in subject to further identification.

The Court: Mr. Jay, will you resume the stand.

RALPH JAY

recalled as a witness by and on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. You are now being handed a paper marked for identification as Defendant's Exhibit A-6. Have you ever seen it before? A. Yes, sir.

Q. Where did you first see it?

(Testimony of Ralph Jay.)

A. I first saw this in Washington, D. C.

Q. And what is the document, without saying what it contains? A. It is Order C.

Q. Issued by whom?

A. Issued by the Secretary of War, Robert P. Patterson.

Q. Was that received at your office in the regular course of business as an order and was it acted upon by you as such? A. Yes, sir.

Mr. Belcher: I will now offer it.

Mr. Garland: No objection. [87]

The Court: Admitted.

(Defendant's Exhibit A-6 received in evidence.)

(Witness excused.)

Mr. Belcher: That is our case, Your Honor.

The Court: The defendant rests. Is there any rebuttal?

Mr. Garland: I would like leave of the Court to amend the complaint orally at this time by asking that there be included for jurisdiction of the Court Section——

The Court: May I make this suggestion, that you take a piece of scratch paper and write out the exact wording of the amendment that you wish to make, and then you can state at what place you wish the proposed amendment to be inserted in the complaint, if it is any place.

Mr. Garland: I move to amend paragraph 1 of the complaint in the cause of Thornton vs. United

States, No. 2046, by adding to the first paragraph, "Jurisdiction of the above Court is further invoked by Title 46, Chapter 22, Section——

The Court: Jurisdiction of the above named Court is——

Mr. Garland: ——further invoked by Title 46.

The Court: By and under?

Mr. Garland: By and under Title 46, Chapter 22, Section 781, USC.

The Court: Do you have that before you?

Mr. Garland: Yes.

The Court: What is the number of the page?

Mr. Garland: Page 511.

The Court: Is that in the bound volume?

Mr. Garland: That is in the bound volume of United States Code annotated.

Mr. Belcher: I object to the amendment. That relates to damages to vessels.

The Court: Is there any part of the Statute that relates to personal claims or breach of services to a vessel and the admiralty claims for payment for services rendered to a vessel?

Mr. Garland: The interpretation is that it relates to vessels, because of the note put in by the annotator. The case of *Gentry vs. U. S.*, 73 F. Supp. 899, is a case where a seaman employed by the Army Transport Service of the United States sued to recover wages, and in that case they held that the Act applied and he could recover his wages under the Act.

The Court: Did it make any distinction as to

whether the jurisdiction invoked by [89] the suing party was on the admiralty or law side of the Court?

Mr. Garland: Yes. It was on the law side of the Court, and they allowed it to be amended into the admiralty side of the Court during the trial, very similar to the situation here.

The Court: You have not covered that point here. Do you think, if the Court permits this amendment to be made, this case should further proceed on the law side where it now is or on the admiralty side of the Court? If you have any thought on that, do you make any request in this amendment in connection with that question?

If you are suing in the state Court, this last question would not be of any moment, because the state Court has general jurisdiction. All you need to show to the state Court concerning its jurisdiction is that the plaintiff has a right against the defendant and you need a remedy. That is all you need to show to the state Court, but in this Court you are faced with a different problem. It is a Court of limited jurisdiction and you have to show affirmatively that the Court does have jurisdiction.

The Court does have jurisdiction in admiralty matters irrespective of diversity of citizenship. The Court has jurisdiction of law matters between private [90] individuals on the basis of diversity of citizenship, under certain conditions, and this Court has jurisdiction in actions involving the United States of America on the law side as well as the

admiralty side under some circumstances, but those circumstances should be pointed out.

In that connection, I ask counsel for plaintiff as well as counsel for defendant to look at the Statute relating to the jurisdiction of this Court and see if it expressly authorizes anybody to sue the United States of America on this kind of a claim on the law side of the court in this Court. I will not ask you to spend any time to determine whether or not on the admiralty side of the Court this Court may have jurisdiction, because that is too obvious to require further study.

Mr. Garland: The venue of the suit is under Section 782. "Such suit shall be brought in a District Court of the United States for the district in which the vessel or cargo charged with creating a liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then the District Court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the [91] United States."

The Court: That sounds like an action in rem to me, where instead of proceeding against the property, the Congress has consented that you sue the United States personally under that condition there stated in the Court meeting that condition. What about in personam actions against the United States?

Mr. Garland: I do not wish to waive any action that I have in law, and this case which I have quoted to Your Honor fits exactly on the facts presented here, where they considered both questions and they considered both questions of law and admiralty in both of the actions, and the man had apparently cited all the actions.

The Court: Where is the Statute that says this plaintiff may sue this defendant in this Court at Law?

Mr. Garland: Section 782 of Title 46, USC.

The Court: What does it say?

Mr. Garland: "Suits shall be brought in the District Court of the United States for the district in which the vessel or cargo——"

The Court: I think that is venue, I do not think that is jurisdiction.

Mr. Garland: That is venue, that is correct.

The Court: Then you find the express provision in the Statute saying that this Court may entertain suits brought against the United States by anybody with a claim against the United States the same as in the state Courts an individual can sue any other individual.

Mr. Garland: Section 781, the previous one quoted, says a libel in personam——

The Court: That is not what you have. You have not an admiralty action. You have a law action here. You will probably find a provision somewhere else in that Statute. The Court will take a short recess.

(Recess.)

The Court: Have you anything else to say?

Mr. Garland: Yes, Your Honor.

The Court: This action was brought in 1948?

That was before September 1, 1948, before this Title 28 USC went into effect.

Mr. Belcher: What was the section, Your Honor?

The Court: It is old Title 28 USCA, Section 41, Sub-section (20). One of the provisions is, that concurrent with the Court of Claims, the United States District Court—this is the effective provision, The United States District Court shall have jurisdiction “of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress . . . or upon any contract express or implied with the government of the United States.” Do you contend [93] that that does or does not apply to this action?

Mr. Garland: I contend that it does apply to this action, but also I believe that concurrently with that section there is jurisdiction in this Court on its admiralty—

The Court: Yes, but this is not yet an action in admiralty.

Mr. Garland: I contend that it does apply, Your Honor.

The Court: There is another law that grows out of the embarkation by the government in the merchant shipping business by the operation of steam-

ships. There is a provision in connection with that law, as I recall, that under some circumstances authorizes suit against the United States or the shipping board, or at least the United States, and there are certain conditions in that law. As I recall, one of them is that a claim must be filed with the War Shipping Administration and you must wait a certain length of time until the War Shipping Administration has time to act on it. Then you have to allege what the result is with respect to the action taken by that administrative agency. I suppose, since you have not alleged that, perhaps there is some difficulty there. It is a little bit difficult for the Court to be put in the position of suggesting various acts of Congress under which relief might be had. Either the case should be discontinued or dismissed or amended or stopped or something so as to give counsel an opportunity to finally decide what they want to do.

Mr. Belcher: May I make this observation, if Your Honor please?

The Court: You may.

Mr. Belcher: The Seventy-ninth Congress, Second Session, 1946, enacted Public Law 600. I refer particularly to Sec. 12, contained at page 809 of Volume 60 of United States Statutes at Large, which reads, "The head of any department may delegate to subordinate officials (1) the power vested in him by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his department;

(2) the authority vested in him by Sec. 3683 of the Revised Statutes (31 USC 675) to direct the purchase of articles from contingent funds; . . .”

Sec. 71, Title 31, USCA reads as follows: “Public Accounts to be settled in General Accounting Office. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.” [95]

Sec. 71a. “(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such claim first accrued: Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.”

In that connection, under Title 28, Sec. 41 (20)——

The Court: Do you contend that Sub-section 20 is the Tucker Act?

Mr. Belcher: Yes, sir. In the case of *Watson vs.*

U. S., the Fifth Circuit, reported in 107 F. (2), p. 1, "Suit against the United States for return of amounts deducted from pay for Civil Service Retirement and Disability Fund, brought by one involuntarily separated from the Civil Service, complaint not alleging prior resort to the Civil Service Commission was properly dismissed for failure to allege exhaustion of the administrative remedies."

This man had a remedy, if Your Honor please. He [96] never was employed in the manner that the laws of the United States require. He was employed by the superintendent without proper authority after he had once been separated from the service. He has a legitimate claim. I don't think there is any doubt that the General Accounting Office would pay his claim under the circumstances, but the issues in this case were made up and we had absolute instructions from the Attorney General to raise this issue, and that is why we raised it.

The Court: I am going to make this general observation as a tentative observation. It is not the pronouncement of any law or ruling of the Court.

The inquiry that immediately arises in my mind in this connection is, was or was not this man employed to do ordinary maritime service on board a ship in maritime service undertaking? If he was, the question is, is there some law which limits his right to sue the United States, and if there is, why he may not proceed as any seaman would proceed in personam against his employer after he has ren-

dered services and his services have been accepted. That is the thing that immediately arises in my mind.

In a suit in admiralty for the recovery of wages against an individual employer, not the government of [97] the United States, you would have a lot of trouble showing to the Court that the admiralty court does not have jurisdiction to grant relief for services rendered to a ship in maritime service. We would naturally first be concerned to see if there is any Statute which prevents that same employee, if he is employed by the government through the shipping board or War Department to render services to a government merchant vessel in the merchant service or any other maritime service, from bringing the same kind of suit in admiralty.

Mr. Belcher: I don't think there would be. I think Your Honor is absolutely right.

The Court: That answer should be given apparently by the suing party and his counsel after mature reflection, and the Court is not going to put the suing party's counsel in the position of having to decide this very moment without further consideration how they are going to proceed here. I am going to suggest a continuance.

Mr. Belcher: His remedy, as pointed out in the Watson case, is to file his claim with the General Accounting Office and proceed in that. I don't have any doubt that when all the facts are known, he would be entitled to recover on quantum meruit.

The Court: The case will have to be continued

in [98] order to avoid the danger of the Court making a ruling to the prejudice of one side or the other without an opportunity of making a thorough consideration of the ruling before it is announced. I suggest to counsel there is only one thing to do in view of the present situation and that is to have the matter continued over at least 30 days, if not longer, to give both sides further opportunity to finally decide what position and course will be finally taken in the case.

Mr. Garland: I will make the motion to continue, Your Honor.

The Court: The Court will not act upon that trial amendment now which you request. You may request it at some other time and some proper time. If you decide amendments should be offered, you should make them before any trial date, which may now be fixed, arises.

Mr. Garland: We will do it on the regular motion date. Would it be proper, Your Honor, to continue this subject to call?

The Court: I want to continue it to August 9th for trial. That is conditioned upon the pleadings being settled before that time. I suggest you bring on any motion for amendment not later than the motion day on Monday, July 25th.

The Court will not be available to hear further proceedings in this case of any kind, those in the usual course or any that might be in the nature of an emergency, before the 7th of July.

All parties and their counsel and the witnesses are excused in this case until Tuesday, August 9th.

(At 10:35 o'clock a.m. Wednesday, June 23, 1949, trial proceedings adjourned until Tuesday, August 9, 1949.)

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,

Official Court Reporter. [100]

Morning Session, Tuesday, August 9, 1949

The Court: Are the party and counsel ready to proceed with the further trial of Thornton versus the United States?

Mr. Belcher: There has been interposed a motion on behalf of respondents to dismiss, and in the event the motion should be denied, I would like to proceed with the trial with the permission to file an answer, which will be nothing more nor less than a general denial.

The Court: Unless there is some objection, you will have the right to do what you request. It may be understood, if you wish it to be so understood.

that should the case proceed to trial after the hearing of these exceptions or motions, that the United States of America is deemed to have filed or made an answer to the complaint or libel denying the material allegations thereof.

Mr. Belcher: That is correct.

Mr. Garland: No objection.

The Court: I'll hear you briefly on these exceptions to the libel in personam.

Mr. Belcher: There is only one, that the libel herein fails to state a cause of action in that a [101] specific allegation that the United States of America was the owner of the U. S. Army transport Victory, a public vessel on Puget Sound, and not a merchant vessel, the statute in such case being Title 46, Section 71 of the U. S. Code, providing in part: "A libel in personam may be brought against the United States, provided such vessel is employed as a merchant vessel."

I have filed and served a brief trial memorandum of my exceptions in which I quote the statute. The statute in full reads: "In cases where, if the vessel were privately owned or operated, and a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided, a libel in personam may be brought against the United States, provided that such vessel is employed as a merchant vessel. The libelant shall forthwith serve a copy of the libel on the United States Attorney and mail a copy of it thereafter by registered mail to the Attorney General of the United States."

The service in this case was made by the Marshal, and his return, if I understand it correctly, shows he is the *own* who mailed a copy to the Attorney General.

The first paragraph of the libel reads: "That upon information and belief at all times herein [102] mentioned the respondent, the United States of America, was the owner of the U. S. transport Victory, a vessel on Puget Sound, and not a public vessel."

It seems to me, if Your Honor please, that on the basis of the libel they have not brought themselves within the provisions of the suits in admiralty, and this court is without jurisdiction.

The Court: Mr. Belcher, did you find any cases supporting your statement in the last paragraph of your trial memorandum? Public Vessels Act is not applicable, because that Act by its terms applies only to suits in admiralty in suits for damages or for towage or for salvage services.

Mr. Belcher: That is Section 781, if Your Honor please, Title 46, and to answer Your Honor's question directly, I did not find any cases directly in point, although the statute itself seems to answer Your Honor's question, for this reason: A libel in personam in admiralty may be brought against the United States, or proceeding against the United States for damage caused by public vessels of the United States and for compensation for towage and salvage service, including contract salvage rendered to a public vessel of the United States, provided

that the cause of action arose after the 6th of April, 1920. [103]

It seems to me that limits the right of libel in personam for compensation for towage and salvage services, including contract salvage rendered to a public vessel of the United States.

The Court: What is a public vessel of the United States which is not a merchant vessel?

Mr. Belcher: This is a transport, an Army transport, if Your Honor please, and there are cases to the effect that even where an Army vessel in charge of the Army, transporting merchandise for the Army——

The Court: It may be that counsel didn't understand my words. What I am trying to give you an opportunity to state into the record and to advise the court about is this: What two classes of vessels—if there are two separate classes of vessels—are dealt with in these two separate statutes?

Mr. Belcher: The two separate statutes—the suits in admiralty applies to private vessels and makes public vessels liable to the same extent.

The Court: I understand there are two statutes: One, Section 742 of Title 46, and the other, 781.

Mr. Belcher: That is correct.

The Court: I am raising my voice only for the purpose of making myself understood by counsel, for no other reason.

Mr. Belcher: I understand.

The Court: I wish you would explain to me what your contention is as to what kind of vessels are

referred to in each of the statutes, if there are different kinds of vessels referred to in them.

Mr. Belcher: I think not. I think public vessels are vessels that are owned by the United States or in charge, or owned by a corporation of the United States, whereas the Suits in Admiralty Act is applicable to private vessels, and there is an exception made there that a public vessel may be held liable under certain circumstances.

The Court: What vessel owned by the United States may be attached with liability under Section 742, if any? Then, if there is any other kind of public vessel that may be attached with liability in Section 781, tell me what you contend may be the difference between those two classes of vessels.

Mr. Belcher: I contend that under Section 742 the vessel must be employed as a merchant vessel.

The Court: And it must be so alleged in the libel?

Mr. Belcher: Yes, Your Honor.

Now, in Section 781, which is the public [105] vessels act, it is strictly provided that that is limited to damages for compensation for towages and salvage services, including contract salvage rendered to a public vessel of the United States. There isn't any question that an Army transport is a public vessel.

The Court: Whether it is in the merchant service or not?

Mr. Belcher: Yes.

The Court: Might this second section that you

are dealing with, 781, refer to war vessels, battle-ships?

Mr. Belcher: I don't think so, no, Your Honor, nor would it apply to troop ships such as the Goucher Victory is.

I am basing my exceptions on the allegations of the libel, if Your Honor please.

The Court: I'll hear from opposing counsel, if he wishes to be heard on it.

Mr. Garland: If Your Honor please, I think our case rests entirely on Section 781 of Title 46.

The Court: Would you get me that statute, Section 781 of 46?

Mr. Garland: Would Your Honor care to look at my copy?

The Court: What is the nature of the cause [106] of action in which you seek to recover under and by virtue of the terms of Section 781?

Mr. Garland: It is a public vessel, not a Navy vessel, nor a merchant vessel. It is a public vessel. There were services rendered that vessel by this man as a seaman. The courts in interpreting that have not interpreted it as contended by the counsel of the United States, but have interpreted it as being in *pari materia*, Section 741 as applies to merchant vessels. Under that are two cases exactly in point, neither of which is binding on Your Honor or courts of equal jurisdiction. *Mentell vs. United States*, and also decided in the same case is *Schmidt vs. United States*, 74 Federal Supplement at page 754.

The Court: Are there any other citations of court decisions?

Mr. Garland: Yes.

The Court: Let me have all of them. I want to go get them.

Mr. Garland: *Gentry vs. United States*, 73 Federal Supplement, 899. *Lauro vs. United States* at 162 Federal Second, page 32.

The Court: Do you know what circuit decided the *Lauro* case?

Mr. Garland: That is Circuit Court of [107] Appeals, Federal Reporter, and it is cited again in the first case cited to you, Circuit Court of Appeals. I might say the last case is not exactly in point, but is a good discussion of the law.

The Court: Do you have any other case, other than these three that you wish the court to consider?

Mr. Garland: No, Your Honor, we do not.

The Court: You check these with me. 73 Federal Supplement, 899; 74 Federal Supplement, 754; 162 Federal Second, 32.

Mr. Garland: Correct, Your Honor.

The Court: Is there a syllabus under this statute, Section 781? Do you find any annotation, is another way to put it.

Mr. Garland: I did not look up the law from it in the U. S. Federal Code Annotated. I used a Federal Digest, and therefore I wouldn't know.

The Court: Have you a memorandum as to holding or ruling or facts in any one of the cases?

Mr. Garland: Yes. In the case of 74 Federal Supplement. I have it marked. 74 Federal Supplement, 754. The first syllabus is as put by the clerk in that case is: "Public Vessels Act. Suits in Admiralty must be read in *pari materia*. Public Vessels Act, Section 781. Suits in Admiralty. Section 741." [108] Both are under Title 46, U.S.C.A.

The Court: Can you pick up first a statement of the facts which called for the court's decision?

Mr. Garland: In this case a Mr. Schmidt was a marine engineer employed by the Government in a crew of a Y-95, a vessel operated by the United States.

Mr. Mandell was a member of a tug operated by the United States. The court said that both of them were public vessels and then discussed whether or not these persons who were suing for wages came under Section 741 and 781.

In that discussion the court said: "The Public Vessels Act provides that a libel in personam in admiralty may be brought against the United States for damages caused by a vessel of the United States."

The Court: Were they doing their work at the time, or tied up to the dock inactive or decommissioned or either? As I understand it, the contention of the Government is that this vessel on which the libelant worked, or is alleged to have worked, was tied up and not being operated as a merchant vessel at the time at all. The services were being performed while the vessel was in reality not at any

labor. Could it have been decided on account of the nature of the work the vessel was doing? [109]

Mr. Garland: The presumption is the vessel, I suppose — they were carrying out their regular duties. There is no discussion of that.

The Court: As I understand it, that is one of the points made by counsel. Do you so understand counsel's contention?

Mr. Garland: No, I do not to this point understand that to be one of counsel's contentions that this boat was tied up, and therefore working on it would be different than when the boat was at sea. I have not heard that put forth as an argument, except by Your Honor just now. We are ready to meet that, if they can point out the difference between a boat tied up and being maintained by a crew and a boat at sea. We will be ready to show where it is the same for this particular libel.

The Court: What do you understand the Latin phrase "Pari materia" to mean?

Mr. Garland: I think that it means that they are to be considered as the same law applying to different particles. I think they come from the same purpose, the same—well, from the same parts, the same maternal mother. That is my interpretation. They would be applied the same. One applies in one class of cases and one in the other; but the interpretation is the [110] same to cover everything.

The Court: Do you or do you not contend that each and both apply to the same set of facts?

Mr. Garland: I contend that 741 applies to a

vessel that would be called a merchant vessel, and 781 applies to a vessel that would be called a public vessel. *

The Court: Not being used as a merchant vessel?

Mr. Garland: Not being used as a merchant vessel.

The Court: Does it apply to a vessel that is not commissioned, that is, decommissioned, or for one reason or other is not pursuing its usual trade or business or function, but merely tied up to the dock?

Mr. Garland: If that question arises I would say that it would. If the vessel is being maintained by a crew—I think Your Honor is under the apprehension that these vessels have been retired.

The Court: I don't think you should regard me as being under an apprehension. I'm trying to find out.

Mr. Garland: I contend we have no such vessel in this particular case.

Mr. Belcher: The evidence, Your Honor, of that has already been testified. This vessel was tied up to the dock and had been for some time.

Mr. Garland: There is no testimony that it is decommissioned.

Mr. Belcher: It was a transport, a troop transport.

The Court: Was it in the charge and keeping of a full crew, just the same as if it had been out at sea?

Mr. Garland: That is my understanding, that it was, that it had a full daytime crew; in other

words, to let the crew go at night they had hired a special crew to come on at night, and that special crew—one of them was called a night mate.

The Court: You take up each one of these cases, please, and let the court know how you apply that case to the facts here and what features there are about the decided case which you contend, if you do, entitles you to call to your assistance at this time the ruling of that case. You know, in the law books there are so many different cases and so many different situations that we can find a bare statement on almost any proposition. The question is, was it made and called for by facts that were then before the court which necessitated the court making such a statement?

Mr. Garland: The case of 74 Federal Supplement, 754, *Mandell vs. United States*, and *Schmidt vs. United States* is a case where seamen were suing under the Public Vessels Act, and it also cited 741, the Merchant Vessels Act. In discussing which act applied and if these seamen were brought under the act, the court on page 755—

The Court: What column and what syllabus?

Mr. Garland: The syllabus Nos. 1 through 4, all discussed at the same time, and it is the second paragraph on the right-hand column of said page.

The Court: I have it before me, the beginning of that paragraph.

Mr. Garland: Yes. I have that marked to put in the facts before Your Honor. Then that whole paragraph would have to be read to get the ruling

without taking it in line. I'd be glad to read it to Your Honor.

The Court: Where are the facts in the case that have been before the court stated?

Mr. Garland: I beg Your Honor's pardon?

The Court: Where in the report, the Mandell-Schmidt case do you find a statement of the facts then before the court in that case?

Mr. Garland: The statement of facts is in the introductory to the case before the discussion of the points of law under questions 1 to 4.

The Court: Where is that, now? Is it still in 1 to 4?

Mr. Garland: The statement of facts is not in 1 to 4. I have explained those to Your Honor. The statement of facts precedes that, stating that Schmidt was a member of the crew on one boat and that Mandell was of the crew of another boat, but that the question to be decided was the same. The Government moved to have the libel dismissed on much the same ground that the Government moves to have it dismissed here, that the Public Vessels Act and the Merchant Marine Act did not apply, and that was the question involved, that one of these acts did apply to a seaman on a public vessel.

The Court: Apparently the act involved, so far as Mandell is concerned was one for damages for wrongful death, was it not?

Mr. Garland: Yes.

The Court: Where does it speak as to Schmidt?

Mr. Garland: In the first paragraph under the

discussion of the case after the judge started to give his decision.

The Court: Schmidt became ill and inflicted with T.B. while in the service of the vessel and was [114] thereafter removed from her for hospitalization. This suit was instituted for the recovery of maintenance and cure and damages.

Mr. Garland: That is right.

The Court: It is not an action for——

Mr. Garland: Wages.

The Court: ——wages.

Mr. Garland: I was mistaken in that, Your Honor.

The Court: The government in both cases has filed exceptions to the libel and in the Mandell case has moved to dismiss. The chief legal issue in both actions is whether a member of a crew of a public vessel who is in the employ of the United States can maintain an action against the United States under the Public Vessels Act, Section 781. There is a factual question as to whether or not the vessels here involved are public or merchant vessels, and were the disposition of these cases to turn upon a determination of that issue I would hesitate to make a decision on the record as it now stands; however, that fact I feel is not controlling.

Libelant in both cases claims that the Public Vessels Act was intended to subject the Government to the same sort of liability growing out of [115] the activities of the Public Vessels Act as the Suits in Admiralty did concerning the merchant vessel.

Therefore, since a merchant seaman employed by the Government upon a merchant vessel can sue the United States under the latter act, it is argued that it does not change the result.

Mr. Garland: That is what the court so held, Your Honor, that we could bring suit under the Public Vessels Act the same as we could bring suit under the Merchant Marine Act.

The Court: In other words, you can treat the situation as if all the Public Vessels Act said was the same rule stated as to Merchant vessels being operated by the United States. No. Strike that. You can conclude that you have the same right to sue a public vessel of the United States no matter whether it was being operated as a merchant vessel or not. All you need to do is have a public vessel.

Mr. Garland: I'll go that far. That is right, irrespective of what is now said in the Public Vessels Act as to the cause of action or the activities of the vessel.

If you will notice, Your Honor, counsel is saying it is limited to these things where the act says for damage caused by the boat, and these things [116] which he puts on as a limitation, where, in fact, those things are meant to enlarge the Act, not to limit it. The word "and" is in there, not "only," these particular items which he intended to limit the Act to. Does Your Honor follow me there? You have the Act in front of you.

The Court: I follow the nature of your argument. See if you can find a place where the decision

is made. It is rather continuous and long drawn out. It is difficult to find the spot where the court decided to nail the point down.

Mr. Garland: On page 755 on the right-hand side of the page about the middle of the page it starts in a new sentence with the word "however."

The Court: There are a great many "howevers." I see that now.

Mr. Garland: "However, it is my belief the libelant's contentions are substantially correct that the Public Vessels Act in Suits in Admiralty must be read in *pari materia* and that the former was an attempt to equate the government's liability in operation of its merchant and public vessels."

The Court: Do you understand that sentence?

Mr. Garland: I believe, Your Honor——

The Court: Tell me what you think it means. I am not so sure.

Mr. Garland: It is my thought there that the court is putting the same liability on the Government whether they are operating a public vessel or a merchant vessel.

The Court: What does the word "equate" mean? Does it mean equalize?

Mr. Garland: In this particular——

The Court: Having the same application to the same state of facts?

Mr. Garland: Yes.

The Court: Doesn't make any difference which, and that word, taken with the Latin phrase "*in pari materia*" mean it doesn't make any difference

which act you sue under, that the Government is liable under either.

Mr. Garland: The Government——

The Court: The fact that Congress passed two different acts doesn't mean a thing?

Mr. Garland: It means it passed one act to take in certain situations and one to take in other situations; but the two acts take in all.

The Court: Does *pari materia* mean the same subject matter, the same scope, or what does it mean to you, if anything? [118]

Mr. Garland: I would state having the same purpose to be accomplished; it has the same ancestry. I don't believe it means the same material. I might be wrong in that, but I believe it means that it springs from the same purpose to be accomplished. I think to equate means to make an equal application in one act as in the other. I believe that is what the court so decided in that sentence.

The rest of the decision shows where it would not apply to members of the armed forces, and then it shows in Section 5 that cases that we are not concerned with would not apply; but we come under the ruling of that court.

The Court: Down further, the next to the last sentence in that paragraph in the right-hand column: "I feel that these suits," mean the Schmidt and Mandell suits then before the court, "would lie under the Suits in Admiralty Act" and those two men, as I understand, were members of the

crew of war vessels. Is that your understanding or do you have a different understanding?

Mr. Garland: They are not members of the armed forces, but members of a crew of a war vessel.

The Court: When hurt were those vessels operating in connection with war maneuvers or somewhere [119] in Italy—Italian waters?

Mr. Garland: I presume that is the fact, although that isn't in my opinion what the case is decided upon. It says one vessel hit a mine.

The Court: Where was the vessel and what was she doing when she hit a mine?

Mr. Garland: She was in the Mediterranean.

The Court: All right, Mediterranean, instead of Italian waters.

Mr. Garland: That is the same waters, Your Honor.

The Court: In what capacity do you think the persons Mandell and Schmidt were employed?

Mr. Garland: I think they were members of the crew.

The Court: Schmidt was a marine engineer employed by the Government as a member of the crew of the Y-95.

Mr. Garland: Yes.

The Court: The decedant Mandell was a member of the crew of a tug LT-21 employed by the United States, a member of the crew when the vessel hit a mine.

Mr. Garland: That is correct.

The Court: Doesn't say where the vessel [120] was when Schmidt became sick with T. B. Maybe one reason for not saying so is because it probably couldn't have been stated within a degree of plausibility where he was, because his illness may have been a gradual progress. We probably have a public vessel engaged in war activities or in activities connected with the servicing of naval wartime activity, and during that time in the Schmidt case the man was alleged to have fallen ill and therefore became entitled to maintenance and cure and for damages for having suffered tuberculosis. In the Mandell case it is alleged that the seaman—no, that the member of the crew on the war vessel got hurt in the course of his duties. Isn't that true?

Mr. Garland: That is true.

The Court: So we do not have a case of, one, like the libelant in this case being ashore, an employee, an ordinary employee that came from the shore to do daily work on a vessel that was not a merchant vessel, although it was a public vessel, was it not?

Mr. Garland: Yes, Your Honor. I believe the deciding thing, each one was a member of the crew. Our libel states this man was a member of the crew. There is a deciding factor, not that it takes in [121] foreign waters; not that one got T. B. and not that one lost his life. The deciding factor is that each was a member of a crew working on a public vessel and that this act was designed, ac-

ording to the *interpretation* this court, to protect persons who are members of a crew on a public vessel for damage done by that vessel.

The Court: You may proceed with your statement or argument as to why you think these exceptions should be overruled.

Mr. Garland: I have nothing further to offer, Your Honor, except the explanation that this man is a member of the crew of a public vessel; that under the wording and the interpretation of 46, United States Code, Paragraph 781, he is entitled to relief; that he has not been paid for his wages that were earned, and until today no denial was made that he had earned these wages; that the Government has consented to be sued, and that we should proceed with the presentation of facts here at this time.

The case of Gentry vs. United States, which I have quoted Your Honor, 73 Federal Supplement, is a case where a seaman was suing for wages and that was under 741.

The Court: Or 2? Was it 1 or 2? [122]

Mr. Garland: I thought they sued under 741. They sued under 741, the Merchant Vessel Act, and the court said, "If you will go and come back under 781, your relief will be well asked for." That case is decided by paragraph 9, the very last paragraph in the case as it appears on page 903. That is a person suing for wages who was working in the Army transport service, the same as this person was working for the Army transport service. The

court says: "Since the libel invokes the jurisdiction of this court under Suits In Admiralty, Section 741 and following, and it appears that the vessels involved were public vessels of the United States not employed as Merchant Vessels, respondent's exceptions will be sustained with leave to libellant to amend pursuant to local rule 129 so as to invoke jurisdiction under Public Vessels Act 781" and that is how we proceed, Your Honor.

If you review the pleadings, we also asked for permission to amend and did come back under Section 781.

The Court: Were you suing in admiralty previously?

Mr. Garland: No, Your Honor, we were not suing in admiralty. We were invoking the public liability act in the law cited the court. As Your [123] Honor suggested under that section we also found cases to sustain our proposition. At least, the wording of them did, but we are at this time satisfied to rest on the admiralty side of the court.

The Court: I understand there is something more than that. The meat in the coconut is that you claim now to be suing under Section 781.

Mr. Garland: That is correct.

The Court: Now, then, I have looked at those two decisions and now wish to consider the 162.

Mr. Garland: That case only dicta supports our proposition, but it is a case of appeals of the Court of Appeals.

The Court: Where is the dicta?

Mr. Garland: On page 35.

The Court: One paragraph that has a 10 within a bracket?

Mr. Garland: It is above that, Your Honor, as you will see some citations in the middle of the paragraph above that, and it starts out: "The Western Maid—" and so forth. It is true, it allows recovery by suits in admiralty by officers and members of the crew.

The Court: Wait a minute. Just a moment. I don't see those words. [124]

Mr. Garland: Let us stop at the top of the paragraph. It will be better to understand those words.

"Libelant claims that proof of Italian law is unnecessary——"

The dicta in that case is that they recognize these cases from the Circuit Courts as being correctly—correctly stating the law that an officer or seaman can bring action under the Public Liability Act No. 781.

I have nothing further.

The Court: The court overrules the exceptions.

Mr. Belcher: May I make this observation?

The Court: I have no objection to your doing so, Mr. Belcher, if you will not consider this practice as precedent in future cases. You may proceed.

Mr. Belcher: I want to call Your Honor's attention to the fact that in the 73 Federal Supple-

ment decided by Judge Mathias there was a written contract involved in that case.

The Court: I don't know what case you are referring to.

Mr. Belcher: I am referring to the case of Gentry vs. United States. Libelant, formerly an employee of the United States of America, by and through [125] the Army transport service filed this action for allegedly unpaid wages and bonus.

The Court: Suppose that the court thought in this case that the plaintiff was entitled to prove that although he may not have had a written contract he had an oral contract with somebody which was disputed by the Government, but nevertheless the Government permitted the libelant to go to work and continue working and received his services? A libelant has a right to have the court decide as to whether or not that would not take the place of a written contract creating the status of employer and employee.

The ruling announced overruling the exceptions will stand.

Mr. Belcher: Your Honor will allow an exception.

The Court: Allowed.

At this time we will take a brief recess, after which we will proceed with this trial.

(Recess.)

Mr. Garland: There has been considerable evidence taken by the plaintiff, and I would like to

move at this time that the court consider that evidence as part of this amended libel. [126]

The Court: Any objection?

Mr. Belcher: No objection.

The Court: It is so ordered. The court will do that. Do not cover that ground or any part of that ground in the testimony, if any is received later.

Mr. Garland: The plaintiff at this time rests, Your Honor.

GEORGE MERRILL

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name, please?

A. George Merrill.

Q. What is your occupation?

A. I am occupied as a marine superintendent, Seattle Port of Embarkation.

Q. You have been for how long?

A. The past three years. I am wrong on my dates there.

Q. Were you marine superintendent at the time the Goucher Victory was berthed in Seattle?

A. Yes, sir.

The Court: Will you spell your last name [127] for my convenience?

The Witness (Spelling): M-e-r-r-i-l-l.

The Court: And the first name and initial?

(Testimony of George Merrill.)

The Witness: George N.

The Court: You may resume the examination.

Q. What are the duties of marine superintendent?

A. The duties of marine superintendent. At the present time our duties—my duties are to inspect vessels, act as liaison with the Coast Guard on Coast Guard regulations.

Q. Were those your duties in the month of July, 1947?

A. No, sir. I was employed as a dispatcher, marine superintendent dispatcher.

Q. But you are in the office of the marine superintendent at the time?

A. That is correct, sir.

Q. What was your duty at that time?

A. At that time I was dispatcher. I would set up vessels for sailing, arrange with different outside agencies for services necessary for the vessels such as quarantine and public health, immigration customs and—

Q. Did you have anything to do with the keeping of the deck log?

A. Yes, sir. I would make entry on the arrival and departures of all shifts in the port area on any shift.

Q. Have you in the deck log covering the Goucher Victory [128] an entry—

A. May I correct you? This is not a deck log; it is an office log of the marine superintendent.

(Testimony of George Merrill.)

Q. All right, an office log.

A. I have this log before me, yes, sir.

Q. In Coast Guard parlance that is the deck, isn't it? A. Sir?

Q. Isn't the office the deck?

A. The office, the deck?

Q. Yes.

A. I might term it that way in nautical terms.

Q. It is the office? A. Yes.

Q. That was kept either by you or under your supervision and direction; isn't that correct?

A. It was kept by me and other marine superintendents during their shift.

Q. Have you before you the office log covering the Goucher Victory?

A. Yes, sir, I have.

Q. The year, 1947? A. Yes, sir.

Q. What type of ship was the Victory?

A. A victory ship, EC 2 type, classified with the Maritime Commission. She was employed by the Army as [129] a troop transport. Her holds were fitted out with berths and bunks for the troops.

Q. When was that conversion made?

A. I can't answer that question. The conversion was probably made——

Q. When did the ship first come into port?

A. The ship first arrived in Seattle about April of 1947. She was transferred from San Francisco Port of Embarkation.

(Testimony of George Merrill.)

Q. At that time what was she, a troop ship?

A. She was a troop carrier, yes, sir.

The Court: Beginning when?

The Witness: I do not know the date that she was——

The Court: The approximate date.

The Witness: She was signed to the Seattle Port of Embarkation April, 1947.

Q. When did she arrive in Seattle?

A. She arrived Seattle——

Q. You may consult your log.

A. ——the 10th—On this particular voyage she returned to Seattle on the 10th of July, 1947.

Q. 10th of July, 1947. In other words, she first was assigned to you in April, but didn't arrive until July; is that correct? [130]

A. I'd have to check back through the log for that.

Q. Would you do that, please?

A. No, she had made a voyage into Seattle before that, arriving on the 11th of March, 1947.

Q. As a troop ship?

A. As a troop ship, sir.

Mr. Garland: Your Honor, I don't believe that is material. I'll concede the ship might or might not have been in Seattle before April, 1947, and object to it as immaterial and a waste of time.

The Court: Try to avoid unnecessary proof, if that suffices. Act accordingly. If it does not, will you kindly indicate your attitude.

(Testimony of George Merrill.)

Mr. Garland: I object. It is immaterial whether the ship was here before April of 1947 or not.

The Court: I referred to respondent's counsel in my last remark.

Mr. Belcher: Counsel concedes that this was a troop ship and she was berthed in Seattle during the month of July. That is all I need.

Mr. Garland: We have so testified already, so we concede it.

Mr. Belcher: Let's understand, now, that during the entire month of July, and how about August?

The Court: Is the month of August material to this action?

Mr. Belcher: Yes.

The Court: Is there any objection to stipulate—having the first stated stipulation between counsel apply to all times material to this action?

Mr. Belcher: That is correct.

Mr. Garland: That is correct—so stipulated.

The Court: Proceed.

Q. When did the Victory Goucher—Goucher Victory finally leave here, if at all?

A. During this voyage she departed on the 29th of August, 1947.

Q. Now, while the Victory Goucher was in the Port of Seattle—Port of Embarkation, did she carry a full crew?

A. She was not fully manned. She had her assigned crew, but not fully manned.

(Testimony of George Merrill.)

Q. Not fully manned? A. Yes, sir.

Q. She was berthed where?

A. She was at numerous berths during her stay in port on this voyage. She was shifted on the 11th of July. She shifted to anchor in the stream on the 15th of July [132] and she was shifted to pier 37 south outer.

The Court: Just a moment. July 15, shifted to what pier?

The Witness: Pier 37 south outer.

The Court: Pier 37.

Q. What time of the day?

A. She arrived on berth at 0841 in the morning, sir.

The Court: What time of day is that in ordinary parlance?

The Witness: That is 8:41.

The Court: 8:41 a.m.?

The Witness: Yes, sir.

The Court: Next, if there is a next.

A. On the 12th of July the vessel was shifted.

The Court: You mean the 12th, now? You have already passed the 12th.

The Witness: Pardon me, sir.

A. The 17th of July.

Q. 17th?

A. From Pier 37 to Pier 38 north outer.

Q. 37? 38. What hour of the day?

A. The movement started at 1212 and was completed at 1305. 1:05 p.m.

(Testimony of George Merrill.)

Q. 1505? A. 1305. [133]

Q. A.M.? A. P.M.

The Court: Next?

A. On the 28th of July the vessel shifted from Pier 38 north outer to Pier 65.

Q. What time? A. 1755, 5:55 p.m.

Q. All right.

A. On the 13th of August the vessel shifted from Pier 65 to Pier 36, outer berth.

Q. What time?

A. 0755, 7:55 a.m. On the 15th of August the vessel shifted from Pier 36 outer berth to Pier 38 north outer berth. The shift started at 1240, 12:40 p.m., and was completed at 1315, 1:15 p.m. On the 29th of August the vessel sailed from pier 38 north outer at 0608. That is 6:08 a.m.

The Court: Departed for the open sea or other port?

The Witness: Departed for San Francisco, sir.

The Court: What time was that?

The Witness: That is 6:08 a.m., sir.

The Court: You may inquire.

Q. What was the cause of these various shiftings?

A. Due to the fact of arrivals and departures of vessels [134] in the port. We have nine berths, and at different times we have more vessels than what we can handle on berths.

The Court: During that time might she properly be said to have been operated as a troop ship,

(Testimony of George Merrill.)

even though she didn't have any troops aboard?

The Witness: Yes, sir.

The Court: She hadn't been decommissioned and still kept in readiness for future work of that sort?

The Witness: That is true.

The Court: Proceed.

Mr. Belcher: That is all.

The Court: Any cross-examination?

Mr. Garland: No questions.

The Court: Step down. Call the next witness.

PALVIN AMDAHL

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name.

A. Palvin Amdahl. [135]

Q. Mr. Amdahl, where do you live?

A. I live at 2229½ Minor Avenue North.

Q. Seattle?

A. Seattle, Washington.

Q. What is your occupation?

A. At the present time I am assistant chief, Utilization Section, Seattle Port of Embarkation.

Q. What was your occupation during the months of July and August of 1947?

A. I was assistant to Mr. Thomas, chief of marine crew section.

(Testimony of Palvin Amdahl.)

Q. Did you have anything to do with the personnel office at that time?

A. Yes, I did.

Q. Are you acquainted with the libelant in this case, Mr. William P. Thornton? A. I am.

Q. And do you have the records of the personnel office of the Port of Embarkation with you?

A. Yes, I do.

Q. Will you examine them, please, for the purpose of telling us when, if at any time, Mr. Thornton was employed prior to 1947 and in what capacity?

A. Mr. Thornton was first employed as first mate on 8 May, 1942, was assigned to the U. S. H. B. Pacific [136] Monarch.

Q. What type of vessel was that?

A. I am not in Operations, but I believe the vessel was a small type steam coal burning steam vessel, but not of a transport class.

Q. A cargo vessel?

A. It was in a towboat class, large towboat class.

Mr. Garland: If Your Honor please, I know that there was twenty separate positions that he held, and I know we will be here all day if we take this much time on each one of them. I therefore object to 1942 as being too remote and immaterial to the cause of this action.

Mr. Belcher: I challenge that statement, if Your Honor please, because it goes to the very question

(Testimony of Palvin Amdahl.)

as to whether this man knew what the regulations were with respect to reemployment rights.

The Court: Can you stipulate that this man was qualified respecting his knowledge of such matters?

Mr. Garland: No.

The Court: Very well, then, you may proceed as briefly as you can.

Q. Mr. Ahdahl, just briefly state what other employment—Was he continuously employed in that or a similar capacity by the United States Army? [137]

The Court: You mean the libelant?

Mr. Belcher: Yes, Your Honor.

The Court: For how long, to your knowledge was the libelant employed around ships that were operated by the United States Government in any capacity, if you know?

The Witness: Well, according to the record he was employed continuously until 9 May, 1947.

Q. What happened on that day?

A. Mr. Thornton was separated for disability.

The Court: That was on May what?

The Witness: 9 May, '47.

Q. When a man is separated on account of disability what is done by the personnel office?

A. The employee is called in. He is given a physical examination. He'd be instructed in his rights and privileges regarding his separation and at that time would have to make a decision whether

(Testimony of Palvin Amdahl.)

he wished to submit himself to take a physical examination for physical disability.

Q. Is there such a thing as annual leave in the Army service? A. Yes, sir.

Q. Have you any records from which you can testify as to the approved annual leave, if any, that accrued, that [138] was due Mr.—the libelant at the time of his separation on May 9, 1947?

A. Mr. Thornton had accrued leave to his credit covering 29 and six-eighths days.

The Court. 29 and what?

The Witness: Six-eighths of a day, or sufficient leave to cover him from 9 May, 1947 through 6 hours on 14 June, '47.

The Court: June what?

The Witness: 14th.

Q. In each of the instances where the libelant, William Thornton, had changed his position, if he did, what was it necessary for him to do?

A. It was necessary for him to report to personnel office and receive an appointing document changing his assignment.

Q. Did he do that in each of the several occupations that he filled from May 8, 1942 to May 9, 1947?

A. I wasn't in the personnel office for that entire period. However, it would be reasonable to state that he would have had to come to personnel office on many of the occasions to obtain his standard form 50. There may have been exceptions

(Testimony of Palvin Amdahl.)

whereby the paper may have been processed for him; but in any event, he would have received a copy of any action appointing him to the [139] position.

Q. Would that occur on the transfer to each separate ship? A. Yes, sir.

Q. What process was it necessary for Mr. Thornton to go through after he had been discharged or laid off or whatever you might call it, on May 9—separated from service on May 9th, 1947 before he could be legally employed?

A. He would have had to make application for Federal Employment. That application would have had to have been accepted. The employee would have to have been interviewed and approved for the position.

Q. To whom would he file that application?

A. He'd file that with the personnel office.

Q. Was there such from the record filed by him?

A. Not to my knowledge.

Q. Is there any record in the personnel office of the libelant William Thornton having made a written application for reemployment than having gone through the process of physical examination?

A. No record, no.

Q. Finger printing and so forth prior to July 10, 1947, after his separation?

A. No record.

Q. Is it customary for the Army to put civilian employees [140] to work on vessels unless they have

(Testimony of Palvin Andahl.)

fully complied with the civil service requirements?

A. No, sir.

Q. In this case did Mr. Thornton comply with any of the civil service requirements prior to June 10, after he had been separated from his service on May 9, 1947?

A. He never complied with any of the personnel processing for appointment as required by the regulations.

Q. Has anybody in the armed forces—in the Army at the Port of Embarkation authority to employ anybody except in the manner that you have testified? A. No, sir.

Mr. Belcher: You may inquire.

The Court: You may cross-examine.

Mr. Garland: Very well, Your Honor.

No questions of this witness.

The Court: Step down. Call the respondent's next witness.

RALPH JAY

called as a witness in behalf of respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q State your name, please? [141]

A. Ralph Jay.

Q. What is your occupation?

A. Deputy Chief of Civilian Personnel, Seattle Port of Embarkation.

(Testimony of Ralph Jay.)

Q. In 1947 what was your occupation in the month of July and August?

A. Certifying officer, Seattle Port of Embarkation.

Q. What do you mean by certifying officer?

A. Paymaster.

Q. I think at the previous hearing you testified concerning exhibits in evidence which I now offer again in this case, certain payrolls, I think, in that case A-1 and A-2—Exhibits A-1 and A-2.

Mr. Belcher: Which I now ask to be handed to the witness. There are three of them, A-1, A-2, and 3.

The Court: I understand that the libelant effected an application to this part of the trial all of the testimony previously introduced on behalf of the plaintiff and libelant. Does the respondent wish to accomplish the same results?

Mr. Belcher: Yes, I'll do the same and supplement it.

The Court: Any objection?

Mr. Garland: No objection. [142]

The Court: It is so ordered. All the testimony produced on behalf of the defendant or libelant at the previous trial proceedings in this case is now regarded as received in evidence and already and now before the court in respect of this part of the trial proceedings and in respect to each and all parties.

Mr. Belcher: Including all exhibits.

(Testimony of Ralph Jay.)

The Court: Including all exhibits.

Q. Mr. Jay, as certifying officer what are your duties?

A. The payment of civilian personnel employed by the Port of Embarkation, both ship and shore. As to ship side it was generally—it was the duty of the certifying officer shore side to pay the leave only of employees aboard transports.

Q. Certifying payrolls? A. Yes.

Q. In this instance I think you testified at the previous hearing you refused to certify William P. Thornton, whose name appeared on certain payrolls?

A. Yes, sir, for that period of the 10th through the 31st of July, 1947. Those were the only time sheets submitted to me.

Q. Did Mr. Thornton ever come and ask you for his pay? A. No, sir. [143]

Q. Did he ever communicate in any way with you with respect to his pay? A. No, sir.

Q. You were the paymaster during the period of time that Mr. Thornton had been previously in the employ of the Army?

A. I was certifying officer from 1 January, 1945 to 31 December, 1948 continuously.

Q. So that wherever Thornton's name appeared upon a payroll prior to July, 1947 you never questioned it? A. That is right.

Q. Why did you question it after the 10th of July, 1947?

(Testimony of Ralph Jay.)

A. Because he'd not been regularly appointed to the position he was occupying.

Q. What would have happened if you had paid him?

A. I would have assumed a personal liability for the amount paid.

Q. That is pursuant to regulations?

A. Yes, sir, civilian personnel regulation No. 120.

Q. Did you ever have any conversation with Mr. Thornton?

A. No, sir.

Q. With respect to this matter either officially or otherwise?

A. No, sir.

Mr. Belcher: I think that is all. [144]

Q. (By Mr. Belcher): You may state whether or not, if you know, Mr. Thornton had and still has an administrative remedy?

A. He had, and I would—

Q. What is that remedy?

Mr. Garland: I object to that as immaterial. This is the remedy we are pursuing.

The Court: If the respondent doesn't want the record to show that, you may not—I mean if the libelant objects, you may not show that over his objection, counsel.

Mr. Belcher: If Your Honor please—

The Court: You offer it on the grounds that that is in admiralty, although it is not an equity proceeding—that some proceedings may be of a like character?

(Testimony of Ralph Jay.)

Mr. Belcher: Yes, Your Honor.

The Court: Then the court's ruling is reversed, and the court will hear it upon that theory. Proceed.

The Witness: What was it?

A. The presentation of a claim to the claims division, to the general accounting office for reimbursement.

Q. Is that the usual and customary method where a man that has gotten employed improperly—[145]

A. Yes, sir.

Mr. Belcher: You may inquire.

The Court: Have you any knowledge, Mr. Jay, as to how long this man worked and as to which he has not been paid by the Government? If so, will you state that now?

The Witness: Yes, sir. I have certified time sheets for the 10th through the 31st of July that I voided. Those were the only two I saw.

The Court: Is that evidenced by any document now in evidence as an exhibit?

The Witness: It is.

The Court: Can you state the exhibit?

The Witness: Exhibit A-3.

The Court: That answers the court's questions.

The Witness: There is more than that.

The Court: Is there another exhibit?

The Witness: There is another exhibit, A-2, which covers a period—I think it is to August 14, from August 1, to August 14. That is Exhibit A-2.

(Testimony of Ralph Jay.)

The Court: Do you know whether or not those two exhibits show all of the time during which he worked and in respect to which he has not been paid?

The Witness: I couldn't say that I know. I presume it is correct. It is duly certified. [146]

The Court: Can you tell from those exhibits how long he worked for the Government and had not been paid by the Government? If so, will you do that now?

The Witness: Yes, sir. There is 7 hours on July 10, 1947; 15 hours——

The Court: Wait a minute. July 10.

The Witness: 7 hours.

The Court: Next.

The Witness: July 11 through the 15th, 15 hours each.

The Court: Wait a minute. Just a moment. I don't understand.

The Witness: July 10, 7 hours.

The Court: I have that.

The Witness: July 11, 15 hours; 12th, 15 hours; 13th, 15 hours; 14th, 15 hours, and the 15th, 15 hours.

The Court: That means that each one of those days from the 11th to the 15th, inclusive, he worked 15 hours; is that right?

The Witness: Yes, sir.

The Court: That is right. When else did he

(Testimony of Ralph Jay.)

work and did not receive pay for such work, if there is any other time?

The Witness: The 16th to 31st of July, 1947.

The Court: Each day, 15 hours?

The Witness: Total, 240 hours for that period.

The Court: 240 hours from what date, the 15th to when?

The Witness: 16th of July to the 31st of July.

The Court: From July 16th to July 31st, inclusive?

The Witness: Yes, sir.

The Court: Any other day or any other time or occasion when he worked and has not been paid?

The Witness: We have.

The Court: If so——

The Witness: August 1——

The Court: August 1.

The Witness: Through August 14th, 1947.

The Court: How many hours?

The Witness: A total of 203 hours. On the 14th he only worked 8 hours.

The Court: Anyway, he has a total of 203 hours?

The Witness: Yes, sir, for that period.

The Court: Any other time that he worked and has not been paid?

The Witness: No, sir. There is no record. [148]

The Court: What is your understanding about whether or not these hours that you have just stated

(Testimony of Ralph Jay.)

constitute all the hours worked by libelant Thornton for which he has not been paid?

The Witness: It is my understanding that constitutes the entire amount.

The Court: There are five 15's. That makes 75, doesn't?

The Witness: Yes, sir.

The Court: And 240 and 203. According to my calculations all of those hours stated by you amount to the total aggregate number of 525 hours.

The Witness: 535, I believe, Your Honor. Well, no. There are 75 hours between July 11 and July 15. There is 7 on the 10th. That makes 82 hours.

The Court: I have that, and then you have 240 hours from the 16th to 31st of July.

The Witness: That is correct.

The Court: Then you have 203 hours from August 1st to 14th.

The Witness: Yes, sir.

The Court: Then add 82, 240 and 203—three and two are five; four and eight are twelve—two and five—three and two are five—525 hours, is it not? [149]

Mr. Belcher: That is correct.

The Witness: Is it 225?

Mr. Belcher: Yes.

The Court: What is the rate of pay, if you know, worked by him on the last payday when he was paid?

The Witness: I don't have that before me, Your Honor. I can consult the record.

(Testimony of Ralph Jay.)

The Court: Can you do that? Is there any objection to his consulting the record to find out what the rate of pay was?

Mr. Belcher: \$17.25 per day for 15 hours.

Mr. Garland: There is no objection, Your Honor, to his testifying himself. Counsel stipulated. I'd rather the man testify.

The Court: I would like to know, if the witness has any way of telling the court now how much compensation he would have been authorized to work for that time that he would be entitled to have been paid for. That is the ultimate objective to which my inquiry leads.

The Witness: This authorization for the position shows \$10.20 per day, but it doesn't indicate the number of hours in the tour. Of course, there is no record in the file here inasmuch as he wasn't appointed.

The Court: Those connected with this case are now excused until 2:00 o'clock. You may step down.

(Recess.)

Afternoon Session, August 9, 1949

(The witness Ralph Jay resumes the stand.)

Q. (Mr. Belcher): Mr. Jay, during the noon recess have you had occasion to ascertain the rate of pay, either hourly or weekly or daily or whatever it might be?

(Testimony of Ralph Jay.)

A. I have, sir. The rate was \$1.15 per hour.

Q. \$1.15 per hour? A. Yes, sir.

Mr. Belcher: I think that is all.

Cross-Examination

By Mr. Garland:

Q. Is there any overtime, or is that a straight \$1.15 per hour?

A. It is a straight time.

Q. The fact that they worked 15 hours a day does not increase it at all?

A. No, sir.

Q. According to your time sheets was Capt. Thornton [151] acting as a night mate on the Goucher Victory? A. Yes, sir.

Q. Was any other person acting in that capacity at the same time Capt. Thornton was?

A. I am not prepared to answer that. I don't know, sir.

Q. You have no remembrance of any person so acting?

A. No, sir. I wouldn't know, anyway.

Q. Would you know whether or not the position of night mate was a customary and usual position to have on a ship situated such as the Goucher Victory was situated in this port?

A. It was a customary position regularly authorized by the office of chief of transportation.

Q. If anyone else had submitted time sheets for acting as night mate on the Goucher Victory at the

(Testimony of Ralph Jay.)

same time Capt. Thornton was acting, those time sheets would have come through your office?

A. Yes, sir.

Q. You have no recollection of any such time sheets?

A. No, sir.

Mr. Garland: That is all.

(Witness steps down.) [152]

HARRY E. LEIGHTON

called as a witness in behalf of the respondent, being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Belcher:

Q. State your name, please?

A. Harry E. Leighton.

Q. Are you a licensed captain?

A. Yes, sir.

The Court: How long have you been so licensed, Captain?

The Witness: Since 1917.

The Court: You have been working pretty generally all that time on Puget Sound?

The Witness: I have been with the Government thirty-seven years, sir.

Q. You were assistant marine superintendent in August of 1947, July and August?

A. Yes, sir.

Q. Captain, to constitute a valid member of the crew of the Goucher Victory I'll ask you whether or not it would be necessary for one to sign the articles?

(Testimony of Harry E. Leighton.)

A. In my estimation you have to sign the articles to be a member of the crew on any ship.

Q. Did Capt. Thornton sign articles in this instance? [153]

Mr. Garland: I believe the log would be the best evidence of that.

The Court: The objection is overruled.

Mr. Garland: The articles themselves.

The Court: This is proving the negative, a fact which is not alleged to be or contended to be covered by the law.

Mr. Garland: In the original testimony we subpoenaed the log, and they did not produce it.

Mr. Belcher: What?

Mr. Garland: We subpoenaed the log originally from this ship. We subpoenaed Capt. Leighton to produce the log, have it here.

(Whereupon, the questions appearing on lines 20 and 25 of the preceding page were read to the court.)

Mr. Garland: My objection is that the articles of the log of the ship speak for themselves as to what the captain signed. We anticipated that and asked by subpoena for the log to be presented here, and that was served upon Capt. Leighton and also upon the defense.

Mr. Belcher: When was that subpoena served?

The Court: I am going to sustain this objection.

Mr. Belcher: Allow an exception.

(Testimony of Harry E. Leighton.)

The Court: Allowed.

Mr. Belcher: I don't know whether I asked this question and he answered it or not:

The Court: I will say this: Notwithstanding the court's ruling, counsel on either side may by proper questions interrogate this witness as to whether or not it was customary to keep articles in—relating to the employment of these night officers on board these vessels while they were in port under this system of employment of night mates and/or other such officers.

Q. Capt. Leighton, you were assistant marine superintendent? A. Yes, sir.

Q. In July and August of 1947?

A. Yes, sir.

Q. What are the duties of a marine superintendent or an assistant marine superintendent?

A. An assistant marine superintendent at that time and at the present time—you have charge of all the floating equipment under the principal marine superintendent.

Q. When I speak of signing articles as a member of the crew, will you explain to the court just how that is accomplished?

A. The ship's agent, administrative agent on the ship, calls the men before him and signs the articles as to [155] their various positions, the date—

Q. Do those articles appear in the log of the ship?

A. No, sir, they are a separate article altogether.

(Testimony of Harry E. Leighton.)

Q. A separate article altogether? A. Yes.

Q. What becomes of the articles?

A. There are five to seven copies. They are distributed around among the various heads of the departments. One goes to Washington, D.C.; one is kept on file down here.

Q. The log of a ship—what is the—what is the log of a ship?

A. The log of a ship tells of anything that may happen during the day or night. It is entered in the log book. It is supposed to be official.

Q. Are the names of the crew entered in the log book?

A. No, sir, except those who are on duty on the lookout, at the wheel and on the bridge.

Q. In your position as assistant marine superintendent is it your duty to know whether or not the ship was properly manned?

A. Yes, sir.

Q. From what source do you make inquiry to determine whether a ship is properly manned?

A. Generally you ask the mate how his crew is filled up. [156] We only have charge of the deck department.

Q. You only have charge of what?

A. The deck department on the ship.

Q. The deck department?

A. That is right.

Q. Were the duties that were performed by

(Testimony of Harry E. Leighton.)

Capt. Thornton duties to be performed in the deck department? A. Yes, sir.

Q. Did Mr. Thornton advise you at the time that he went to work on the 10th of July that he had been relieved of duty in May, 1947 on account of disability? A. No, sir.

Q. Did he inform you that he had been reemployed? A. No, sir.

The Court: Did he work?

The Witness: Yes, sir. He worked.

The Court: Did he work from July 10th to August 14th?

The Witness: To the best of my knowledge he did.

The Court: Do you know whether he has been paid for that work or not?

The Witness: I do not know.

The Court: You may inquire.

Q. Were you ever present at a conversation between Mr. [157] Miller and the libelant Capt. Thornton? A. No, sir.

Mr. Belcher: That is all.

Cross-Examination

By Mr. Garland:

Q. The position of the night mate on the Goucher Victory at the time Capt. Thornton worked there was a necessary and regular position, was it not?

A. No. That was a wartime position.

Q. I say, at the time Capt. Thornton worked

(Testimony of Harry E. Leighton.)

there. You had night mates on other ships similarly situated? A. On other ships?

Q. All the ships had them?

A. All the ships had them.

Q. At the time Capt. Thornton worked there was no one else to do that duty but Capt. Thornton? There was no one else who did work?

A. He was the only man who worked on that particular ship as night mate.

Q. And if he hadn't worked as night mate, someone else would have had to work as night mate?

A. Yes.

Q. And other than these formalities, you know of your own knowledge that his qualifications for seamanship and [158] ratings are such to qualify him for the position of night mate; isn't that right?

A. Should have been, yes, sir.

Q. You knew he was working as night mate at the time he did work? A. Oh, yes.

The Court: How do you classify your own position, Captain? I, at the moment, did not make a note.

The Witness: Assistant principal marine superintendent.

Mr. Garland: I have no further questions.

Redirect Examination

By Mr. Belcher:

Q. When a man is separated from service on account of disability is it customary to put him back to work without reprocessing him?

(Testimony of Harry E. Leighton.)

A. Not to my knowledge, no, sir.

Mr. Belcher: That is all.

Mr. Garland: No further questions.

The Court: Step down. Call the next witness.

Mr. Belcher: That is our case. The respondent rests.

The Court: The respondent rests. Any rebuttal?

Mr. Garland: I would like to put Capt. Thornton on for a short rebuttal.

The Court: You may do that. He has already been sworn. Well, under this libel, Captain, I believe I will have you sworn again.

LIBELANT'S REBUTTAL

WILLIAM P. THORNTON

libelant herein, being first duly sworn, on oath testified in his own behalf as follows:

Direct Examination

By Mr. Garland:

Q. Captain, were you at any time requested by any person to furnish—turn in your time?

A. Yes, sir.

Q. Tell the court under what circumstances while you were working on the Goucher Victory between July 10th and August 14th, 1947 you were requested to turn in your time, just what happened?

A. Yes. The ship was shifted down to pier 65, and it is quite a distance from 65 to the Port of Embarkation, so when I go off duty I go straight

(Testimony of William P. Thornton.)

home, and when I'd return to the ship—I live in Bremerton—and I would return right to the ship, so one morning there was a man in uniform, a soldier's uniform came with a slip of paper and told me to report at the marine superintendent's office this morning, meaning that [160] morning, and on arrival they said, "You haven't turned in your time yet." That was at Capt. Leighton's office. I went at once and put in my time up to that time.

Q. That was some time before you were officially notified you were through?

A. That was along, I would say the middle of July or a little later.

Q. You have already told the court, have you not, the circumstances under which you were hired?

A. What is that again?

Q. I say you told the court the circumstances under which you were hired already in your original testimony?

A. Yes. Yes.

Q. You told them concerning your previous discharge from the service, how that took place?

A. Yes.

Mr. Garland: Other than repeating our testimony in chief, Your Honor, I have nothing to add to this man's testimony.

The Court: You may cross-examine.

Cross-Examination

By Mr. Belcher:

Q. At no time after your separation for dis-

(Testimony of William P. Thornton.)

ability on the 9th of May of 1947 did you ever make a written application for reinstatement? [161]

A. I never—only the first time I ever made a written application was when I first went into the Port in '42.

Q. You were familiar with the civil service rules?

A. There was lots of rules those days.

Q. Don't you know, as a matter of fact, Captain, that every time you changed your position you had to be processed through the personnel office?

A. No, not all the time.

Q. Well, how many times had you been processed through?

A. Well, there were several times I—quite a number of times; but there was a number of times I was transferred that I was not processed.

Q. Each time you were processed you had to take a physical examination, didn't you?

A. No, sir.

Q. Do you say you did not?

A. I said 'no.' No, sir.

Q. Didn't you yourself process papers for other employees? A. No.

Q. At no time?

A. Not to my knowledge, no.

Q. You were connected with the Coast Guard, weren't you, at one time?

A. The Coast Guard, many, many years ago with the Army—I mean with the Revenue Service, which

(Testimony of William P. Thornton.)

is now the Coast [162] Guard; but that was 1894—'96, rather.

Q. Didn't you serve in the Coast Guard with Captain Jennings, who was the man who hired you?

A. No.

Q. Sir?

A. No. Capt. Jennings used to work for me.

Q. Yes, in the Coast Guard.

A. No. I was port captain for the Puget Sound Navigation Company at that time.

Q. You were very, very good friends?

A. Not exactly, no.

Q. How long had you known Capt. Jennings?

A. Well, I would say I met him first about 1916.

At that time he was quartermaster on the Iroquois.

Mr. Belcher: That is all. Oh, one question:

Q. Did you ever sign articles?

A. Did I what?

Q. Did you sign any articles? A. When?

Q. In July, 1947, before you went to work?

A. No.

Mr. Belcher: That is all. [163]

Redirect Examination

By Mr. Garland:

Q. Captain, did you sign the log?

A. I signed the ships log.

Q. How did you sign the ships log, why?

A. When I arrived aboard the ship it was the duty of the officers I was relieving to make me sign the log, and when I would leave the ship in the morning, why, I would sign it again, or he would

(Testimony of William P. Thornton.)

sign it, the officer that relieved me.

Mr. Garland: That is all.

Recross-Examination

By Mr. Belcher:

Q. You have been in the maritime service for a good many years, haven't you? A. Well, yes.

Q. And you knew in July, 1947, you—to become a valid member of the crew of the Goucher Victory it was necessary for you to sign the articles?

A. No, it wasn't necessary to sign articles. The night mates never sign articles. I have had night men aboard my ship and they never signed articles, and I have also been on other ships other than the Goucher Victory and never signed any articles.

Q. You were not then a member of the crew of the ship, were you?

A. I was signed on as a mate, night mate. That was my duty.

Q. Who signed you on?

A. I was told to go on.

Q. By whom?

A. I was told to go on by Mr. Merrill, George Merrill.

Q. When was that?

A. That was on the 10th day of July.

Q. George Merrill is the George Merrill who testified here this morning? A. Yes.

Q. He was a personnel officer, was he not?

A. No, no, no. In the Marine Superintendent's office.

(Testimony of William P. Thornton.)

Q. He was in the Marine Superintendent's office?

A. Yes, sir.

Q. Who did you first contact or who contacted you first in connection with this night mate's job?

A. I came down to the port looking for that kind of position, and I was looking for Merrill—Miller, rather, John Miller. I came to the Goodrich Building and Miller was not in the office at that time, and I waited a few minutes, and then I left, and just in front of Pier 39 I met Miller, and Miller—I told him I would like to [165] get one of those night mate's jobs. Shall I continue?

Mr. Garland: Go ahead. Continue.

A. He said, "We are not handling those any more. We have nothing to do with that whatever. However," he said, "Jennings has that now. Well," he said, "now, as a matter of fact, Capt. Leighton is the man to go to." And I in turn said to him then, "I have known Harry all my life, almost, and I'll go around and see him." So I went in and saw Harry, and he says, "Certainly, Bill." Those are the words he used. And he said, "By the way, have you been——" I can't use the word right now.

Mr. Garland: May I suggest, Your Honor, the word he wants?

The Court: No. Give him a chance to think of it himself.

A. I just can't say the word. Anyway—"Your services has been stopped to a certain extent." I said, "I don't know. I haven't received any dis-

(Testimony of William P. Thornton.)

charge yet." And—well, Harry said, "Well, we can fix that. Go on in and give your name to Mr. Merrill"—George Merrill, which sets just outside of the office, and I went out, and after talking to Merrill and putting my time down and everything, he said, "Now, by the way," he said, "when we call you up in Bremerton," he says, "you'll have to pay this, pay the long distance call." [166]

The Court: I know this is the second time, at least, this has been gone over. There is no need of telling something you told the other occasions when we were trying this case. Better proceed by question and answer.

Q. (By Mr. Belcher): Do you recall a conversation with Mr. Miller at a later date?

A. May the 9th.

Q. Captain, do you recall having had a conversation with Mr. Miller about the 29th of July, 1947 which was after you had gone to work?

A. No. That is not true.

Q. You didn't have a conversation?

A. No, sir.

Q. To refresh your recollection did he not ask you at that time on or about the date where you were working?

A. No. I never met him until the 14th day of August—after the 10th, or about the 9th of July, I would say. The next time I saw Miller was on the 14th of August, and I met him in practically the same place that I had met him when I asked him the first time about the night mate job.

(Testimony of William P. Thornton.)

Q. You never did receive—you know what the Form WD50 is, don't you?

A. No, I can't say I do. [167]

Q. Well, you know that you get a slip of paper, don't you, when you are hired?

A. Well, yes, yes, in some positions.

Q. Did you get a slip of paper from anybody?

A. No.

Q. On the 10th of July, 1947, before you went to work?

A. I was just told by Mr. Merrill—Miller—Mr. Merrill, rather,—

Q. Do you know where Mr. Miller is now?

A. No, I don't. I know where he was a month ago, though.

Q. As a matter of fact, don't you know that he is out at sea at the present time?

A. That he is what?

Q. He is at sea? A. He is at sea?

Q. Yes. A. Well, no.

Q. Didn't you know that?

A. No, I didn't know it.

Q. You subpoenaed him as a witness in the other case, didn't you? A. Yes, I believe we did.

Mr. Belcher: That is all.

Mr. Garland: That is all.

The Court: Step down, Captain. Call your [168] next witness.

Mr. Garland: We rest, Your Honor.

Mr. Belcher: Mr. Merrill in surrebuttal.

The Court: Call another witness.

Mr. Belcher: May I have just a second, if Your Honor please?

The Court: You may.

Mr. Belcher: I don't know why Mr. Merrill left, Your Honor. I can't get him here for—My information is that he did not contact Mr. Merrill, and Mr. Merrill did not tell him to go to work.

The Court: Well, is your information positive that Mr. Merrill would testify as your recollection and information indicates if he were here? That is the important thing.

Mr. Belcher: That is my idea, yes, Your Honor.

The Court: Is there any lack of agreement between counsel as to that fact? Could you—

Mr. Garland: No, there is no chance of us so stipulating, because my client has all the faith in the integrity of Mr. Merrill, and he says that isn't true, and if that isn't true, it should have been brought out on rebuttal, not surrebuttal, because our—I object on that ground, that it isn't proper surrebuttal, [169] even if brought forward; but I can't stipulate to it in the light of the testimony.

The Court: As I recall there was some testimony at the other trial proceedings on the former date by Capt. Thornton as to what dealings—as to what dealings he had with Mr. Merrill.

Mr. Garland: That is correct.

The Court: The objection is sustained. Call the next witness.

Mr. Belcher: We rest.

The Court: You may argue the case now. Proceed. The lawyers may proceed with argument. I'll hear you from your present stations.

(Whereupon, counsel made their final argument to the court.) [170]

The Court: In view of the fact that the Government through its authorized representatives hired the libelant for the period of work in question and did during that period actually accept the libelant's labor, and in view of the further fact that during that period no other person was hired to perform the duties for which libelant was hired and no other person was paid for performing duties for which the libelant was hired, and in view of the fact that the Government has been unduly enriched unless it pays libelant for the services actually rendered, and in view of the fact that the libelant has been damaged because of the failure of the Government to pay him for such wages, this Court is of the opinion and finds, concludes and decides that libelant may maintain this action against the Government under the Public Vessels Act, and particularly Section 781 thereof (being Section 781 of Title 46, U.S.C.A.) and is entitled to and may recover of and from the respondent United States of America for the hours actually worked by libelant as night mate on board the Goucher Victory from July 10th to August 16th, inclusive, 1947—for the total of 525 hours—at \$1.15 per hour, and for such recovery libelant is entitled to judgment against respondent in this action.

The court will, after advising with counsel [171]

in the case as to their convenience, fix a later date on which the Court will settle and enter Findings of Fact, Conclusions of Law and Judgment carrying into effect this oral decision as announced.

(Whereupon, further argument was heard.)

The Court: This matter is continued until the 22d day of August. That will give you time——

Mr. Belcher: May I say there, if Your Honor please, that I am going to be busily engaged in a trial of a case on that day.

The Court: Very well. The court will set this case for this coming Monday, the 15th of August, forenoon for the purpose of settling the Findings of Fact and Decree, and I ask counsel for the libellant to serve the papers on the respondent's counsel so he may be prepared to make any objections to them he may wish to make.

(Adjournment.) [172]

CERTIFICATE

I, J. R. Wheeling, do hereby certify that I am official reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JOSEPH R. WHEELING,
Official Court Reporter.

[Endorsed]: Filed December 15, 1949. [173]

[Endorsed]: No. 12428. United States Court of Appeals for the Ninth Circuit. United States of America, Appellants, vs. William P. Thornton, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
In Admiralty No. 12428

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM P. THORNTON,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF
RECORD

To the Honorable Judges of the above entitled Court:

Appellant herein, United States of America, hereby refers to and adopts as its Statement of Points on which it intends to rely upon appeal, the assign-

ment of error included in the apostles on appeal heretofore transmitted to this Court; and

The said appellant hereby designates that the entire record (apostles on appeal) heretofore transmitted to the court in this action be printed, together with this designation and adoption of Statement of Points on Appeal.

Respectfully submitted,

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

Affidavit of service attached.

[Endorsed]: Filed Dec. 22, 1949.

